No. 2781

United States

Circuit Court of Appeals

For the Ninth Circuit.

IN THE MATTER OF THE PETITION OF THE EQUITABLE TRUST COMPANY OF NEW YORK, AS TRUSTEE, FOR A WRIT OF MANDAMUS, TO BE ISSUED AND DIRECTED TO THE HONORABLE WILLIAM C. VAN FLEET, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SECOND DIVISION.

PETITION FOR WRIT OF MANDAMUS.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

In the Matter of the Petition of the EQUITABLE TRUST COMPANY of New York, as Trustee, for a Writ of *Mandamus,* to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

Petition for Mandamus.

To the Honorable WILLIAM B. GILBERT, Presiding Judge of the United States Circuit Court of Appeals, for the Ninth Circuit, and to the Judges of said Court:

The petition of the Equitable Trust Company of New York, a corporation, organized and existing under the laws of the State of New York, respectfully sets forth:

On the 29th day of March, 1916, there was pending in the District Court of the United States, for the Northern District of California, Second Division, a certain action for the foreclosure of the First Mortgage of the Western Pacific Railway Company, and the appointment of receivers for the property of said Railway Company covered by such First Mortgage *pendente lite,* in which the Equitable Trust Company of New York, as Trustee, was plaintiff, and the Western Pacific Railway Company, Boca and Loyalton Railroad Company, Chester L. Hovey, as Receiver of Boca and Loyalton Railroad Company, and Mercantile Trust Company of San Fran-

cisco, as Trustee, were defendants, and Central Trust Company of New York, as Trustee, was intervening defendant. The jurisdiction of said Court over said cause was invoked solely on the ground of diversity of citizenship.

There was pending in said court at said time and in said action a petition on the part of the Savings Union Bank & Trust Company for leave to intervene in said cause.

Various controversies had arisen in said cause between the Judge of said court and the plaintiff, certain of which said controversies were presented to this Court in certain original proceedings brought therein, and entitled as follows: *Ex parte* Equitable Trust Company of New York, as Trustee of the First Mortgage of the Western Pacific Railway Company, plaintiff in the action of Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company; In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Mandamus* to be issued and directed to Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, and to said District Court; In the Matter of the Appeal of the Equitable Trust Company from the Order Issuing the Injunction, dated February 21, 1916.

In said proceedings for Prohibition and *Mandamus* John S. Partridge and Garret W. McEnerney appeared as counsel for the said Judge, and on the hearing of the appeal the said Partridge and McEnerney appeared as counsel for the receivers,

theretofore appointed by said Court in said suit of Equitable Trust Company of New York as Trustee against Western Pacific Railway Company and others.

On or about the 14th day of March, 1916, your petitioner was informed that the Judge of the United States District Court, for the Northern District of California, Second Division, to wit, the Honorable William C. Van Fleet, was conducting, and causing to be conducted proceedings in relation to said cause in such manner that it seemed probable that the said Judge entertained a personal bias and prejudice against your petitioner. Immediately upon the receipt of such information by your petitioner, your petitioner sent to San Francisco, Lyman Rhoades, one of the vice-presidents of your petitioner, and instructed the said Lyman Rhoades to investigate the proceedings being conducted in said cause in California, and to ascertain to the best of his ability whether or not said Honorable William C. Van Fleet did in fact entertain a personal bias and prejudice against your petitioner; that said Lyman Rhoades arrived in San Francisco on the 18th day of March, 1916, and proceeded thoroughly to investigate and to ascertain to the best of his ability whether or not the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner as plaintiff in the said action of the Equitable Trust Company of New York, as Trustee, against the Western Pacific Railway Company. Said Lyman Rhoades, after such investigation, reached the conviction that

said Judge did entertain a personal bias and prejudice against your petitioner, but, at the time such conviction was reached by said Lyman Rhoades, there was under submission in this court, to wit, the United States Circuit Court of Appeals, for the Ninth Circuit, the petitions for Mandate and Prohibition hereinbefore mentioned. Said Lyman Rhoades then caused to be prepared an affidavit, embodying his conclusion that the said Honorable William C. Van Fleet entertained a personal bias and prejudice against your petitioner, and a personal bias and prejudice in favor of other parties interested in said cause, and stating the reasons for such conclusion, but that said Lyman Rhoades did not desire that said affidavit should be filed until after the question of the propriety of filing the same had been presented to the president and executive committee of the Equitable Trust Company of New York. Counsel for your petitioner were of the opinion and advised your petitioner that it was proper and right that the question of filing said affidavit should be presented both to the Equitable Trust Company of New York and to the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company, and were also of the opinion and advised your petitioner that such affidavit should not be filed, unless the filing thereof became unavoidable, until after the decision of this Honorale Court in the matters then pending before it;

On the 20th day of March, 1916, the said Honorable William C. Van Fleet announced that he would

make no orders and take no proceedings in the said action of the Equitable Trust Company of New York, as trustee, against the Western Pacific Railway Company, until after this Honorable Court determined the matters then pending before it; and forthwith, upon such announcement being made, the said Lyman Rhoades returned from San Francisco to New York, arriving in New York on or about the 26th day of March, 1916. As soon as said Lyman Rhoades arrived in New York he caused to be there prepared an affidavit, stating explicitly the fact that the said Honorable William C. Van Fleet, Judge of the District Court of the United States, for the Northern District of California, Second Division, entertained a personal bias and perjudice against your petitioner, and in favor of other parties interested in said cause, and setting forth and showing the reasons for his belief that such was the fact.

Thereafter, and on the 29th day of March, 1916, said Lyman Rhoades presented such affidavit to the executive committee of said Equitable Trust Company, and requested their instructions as to whether the same should be filed. The first meeting of the executive committee of the Equitable Trust Company of New York which took place after the said return of said Lyman Rhoades from San Francisco to New York was on said 29th day of March, 1916.

Prior to said meeting of said executive committee the Reorganization Committee of the First Mortgage Bondholders of the Western Pacific Railway Company had requested that said Equitable Trust Com-

pany should file such affidavit in said cause, in the event that said Trust Company should be of the opinion that the said Judge entertained a personal bias and prejudice against said Trust Company, and should be further advised by counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company.

The executive committee of the Equitable Trust Company, being of the opinion that the making and filing of such affidavit was proper and necessary, and that the same constituted one of the duties devolving upon it by virtue of its trust, and being advised by its counsel that the filing of said affidavit was proper and necessary for the protection of the interests of the First Mortgage Bondholders of the Western Pacific Railway Company, duly directed that such affidavit be made and filed; that forthwith the said Lyman Rhoades made said affidavit, and forwarded the same to San Francisco, said affidavit having been made in the city of New York on the 29th day of March, 1916, and before the Equitable Trust Company, or said Lyman Rhoades, had been informed that this Honorable Court had delivered its opinion upon the matters then pending before it; that said affidavit was forthwith mailed to Jared How, San Francisco, counsel for the Equitable Trust Company of New York, and was received by said Jared How in due course of mail, and was, on the first opportunity after the same was received, viz., on Monday, the 3d day of

April, 1916, at forty minutes past nine o'clock A. M., filed in the office of the clerk of the United States District Court for the Northern District of California, Second Division; that at the time of such filing of such affidavit there was presented to said clerk by said Jared How a form for an order in the usual form, directing that the fact of the filing of such affidavit should be entered on the records of the court, and that an authenticated copy thereof should be forthwith certified to the Senior Circuit Judge for said Circuit then present in the Circuit; that said clerk was requested, at the time said affidavit was filed, to take the same forthwith to the said Judge, together with said form for an order; that said Judge, upon said affidavit and form for an order being presented to him by said clerk, refused to receive the same, and directed the clerk to return the same to counsel for your petitioner, and to state to him that proceedings would have to be taken in open court, and the affidavit there presented.

Accordingly and in compliance with the requirements of said Judge, counsel for your petitioner, at the hour of ten o'clock A. M., of said 3d day of April, 1916, presented said affidavit to said Judge in open court, together with said form for an order; that the said Judge requested that said affidavit be read by counsel for the petitioner, and said affidavit was in open court presented to and read to said Judge by counsel for your petitioner; that counsel for your petitioner thereupon moved and requested the Court to make an order that an authenticated copy of the said affidavit should be

forthwith certified to the Senior Circuit Judge of said Circuit then present in the Circuit, in accordance with the provisions of sections 20 and 21 of the Federal Judicial Code. The affidavit hereinbefore referred to, together with a copy of the form for an order presented at the time the same was filed, is hereunto annexed, marked Exhibit I, and made a part hereof. A full transcript of the proceedings had at the time of the reading of said affidavit is hereto attached, marked Exhibit II, and made a part hereof.

That, as appears in said transcript of proceedings, said Court refused at said time to make such order, and continued the matter until Wednesday, the 5th day of April, 1916.

On the 5th day of April, 1916, the said Judge declared that he desired the advice of counsel concerning his duty in the premises, and stated that he had requested Garret W. McEnerney and John S. Partridge to advise him concerning his duty in the premises, as his counsel. A full transcript of the proceedings taking place on said 5th day of April, 1916, is hereto attached, marked Exhibit III, and made a part hereof. That at the request of said counsel for the Judge, and over the protest and objection of counsel for your petitioner, said Judge postponed until Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., any determination upon the subject.

Thereafter, on Friday, the 7th day of April, 1916, at the hour of two o'clock P. M., said Judge filed in the above-entitled cause an affidavit, a copy of

which is hereto attached, marked Exhibit IV, and made a part hereof. To the filing or consideration by said Judge of said affidavit your petitioner objected, and excepted to the ruling of said Judge permitting the same to be filed.

On the same day John S. Partridge, one of counsel for said Judge, filed in said cause an affidavit, a copy of which is hereto attached, marked Exhibit V, and made a part hereof. To the filing or consideration by said Judge of such affidavit counsel for your petitioner duly objected, and to the ruling allowing the same to be filed your petitioner excepted.

In the affidavit filed by said Judge it was declared: "That it is the intent of the affiant to proceed forthwith, and with all possible expedition, to the hearing of any further matters that may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale, and winding up of the receivership; that affiant is satisfied in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein."

After the filing and reading of said affidavit containing said statement, the said Honorable William C. Van Fleet proceeded to entertain advice from Garret W. McEnerney and John S. Partridge, his counsel, regarding his duty in the premises, which advice took the form of arguments upon the merits of the affidavit of Lyman Rhoades above referred to. Garret W. McEnerney, at the conclusion of his said

argument, which said argument was delivered by him as counsel for said Judge, and as advisor of said Judge, stated and declared as follows:

"Now, he has also spoken about this affidavit. Mr. How's theory on the 6th of March, and Mr. Rhoades' theory on the 29th of March, are a little different, and he has referred to it now, and quoted from memory what Mr. Rhoades did say, but I have it here. In paragraph 7 Mr. Rhoades says: 'It is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible up-set price for the mortgage property.' That doesn't mean simply minority bondholders who have come to court, but all minority bondholders who haven't gone into the reorganization. Now, then, if it is to the manifest interest of the minority bondholders to get a high up-set price, what is the interest of the majority bondholders? The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price—so the minority wants the highest up-set price, and the majority wants the lowest up-set price. Now what does the Trustee want? 'The duty of the Trustee is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered, no more and no less, and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.' Now, let us see if we under-

stand this position. The minority bondholders want the highest up-set price; the majority bondholders want the lowest up-set price; the Trustee wants to compel the majority bondholders to pay the true value of the property, all elements of value and all qualifying factors being considered, no more nor no less. So we have three groups of persons present at the fixing of the up-set price—the minority bondholders wanting it low—the majority bondholders wanting it high; the Trustee, over in the corner, wanting to compel the majority bondholders to pay the full and true value of the property. Now, who are the majority bondholders? They are the Reorganization Committee, and it is so stated in paragraph 5 of Mr. Rhoades' affidavit (quoting from the affidavit): 'It is, and at all times has been the desire of the said bondholders that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interest of such of the bondholders as may join in the plan of the reorganization.' So that, after all, the minority bondholders want a high price—the Reorganization Committee, on the other side, wants the lowest possible price, and the Trustee, over in the corner, wants to compel the Reorganization Committee to pay the true value of the property at the time of sale, all elements of value and all qualifying factors being considered. And who represents the Trust Company? Alvin W. Krech is the president of the Equitable Trust Company, and Lyman Rhoades is the vice-president of the Trust Company, and, as he says in

his affidavit, 'and particularly in charge of the matter of executing the trusts vested in said Trust Company'—'in charge of the execution of the trusts vested in the Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company.' So now we have the minority bondholders wanting a high up-set price; the majority bondholders wanting the lowest possible price, and Mr. Krech and Mr. Rhoades, over in the corner, with the duty upon them to compel the full and true value of the property on the sale, all elements of value and all qualifying factors being considered, no more and no less. But who will Mr. Krech and Mr. Rhoades, over in that corner, wanting a full value of the property, talk to with a view to getting that price? Why, Mr. Krech, as president of the Reorganization Committee, and Mr. Rhoades, as secretary of the Reorganization Committee, who want it for the lowest possible price, and I wonder whether Mr. Rhoades affidavit is made as the vice-president of the Trust Company, or as the secretary of the Reorganization Committee?

Mr. HOW.—I am at a loss to understand what that argument is for, unless to foment and create prejudice.

Mr. McENERNEY.—It is to tell the truth about the situation out of Mr. Rhoades' affidavit.

Mr. BOWIE.—Not to appear for the intervenor?

Mr. McENERNEY.—No, sir; I don't represent the intervenor, Mr. Bowie, or anybody who has any interest in the Western Pacific properties, near or remote."

Said remarks above quoted were made by the counsel for the said Judge, in the presence of the said Judge, in the guise of advice to the said Judge, and the Judge did not in any way rebuke said counsel, or object to such argument, remarks or advice, or repudiate the same in any manner, shape or form, but, on the contrary, said Judge had theretofore declared in reference to the proceedings then being conducted before him: "Of course, I am acting under the advice of counsel."

In the said affidavit of said Judge there is set forth a certain letter, purporting to be dated March 8, 1916, addressed to Jared How, and signed by John S. Partridge, said letter being set forth on pages 13 and 14 of said affidavit. Immediately preceding said letter said affidavit stated: "That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon appeal, and stipulate that said appeal might be heard on the 16th day of March, affiant states that John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in words and figures as follows." Then follows the letter, in which letter the said John S. Partridge, as counsel for the receivers, stated: "In regard to the first stipulation" (a stipulation waiving service of the order allowing appeal, notice of appeal and bond on appeal), "I do not see how it is possible by any such paper to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same."

"In regard to the second stipulation" (the stipulation referring to the record on appeal), "if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is, of course, subject to examination and verification, and suggestins of any other papers which it may seem necessary or proper should constitute a part of the record."

Said affidavit contains nothing further upon said matter than as above stated; and the direct and necessary implication from such affidavit is that, as stated in the letter of March 8, 1916, incorporated in such affidavit, the receivers were willing to enter into stipulations and waive citation necessary for the presentation of the appeal on March 16, 1916, after such appeal had been perfected. Such, however, was not the fact, for, after receiving said letter, and on the 8th day of March, 1916, Jared How, counsel for your petitioner, obtained from the Honorable William B. Gilbert, Presiding Judge of the United States Circuit Court of Appeals, an order allowing the appeal, and filed the same, together with an assignment of errors, in the office of the clerk of the United States District Court, for the Northern District of California, Second Division. Said Jared How having ascertained that if citation were issued thirty days would have to elapse before the persons to whom the citation was directed could be required to appear, thereupon determined not to have citation

issued, and forthwith presented to said John S. Partridge, counsel for said receivers, a form for a stipulation waiving citation, consenting to the hearing of the appeal on the 16th day of March, 1916; and also relating to the record on appeal. Said John S. Partridge, on said 8th day of March, 1916, after he had been advised by Jared How that the said appeal had been allowed, and after he had been requested by said Jared How to make and enter into such last-mentioned stipulation, wrote and transmitted to Jared How a letter, of which the following is a copy:

"San Francisco, Cal., March 8, 1916.

Mr. Jared How,
Mills Building,
San Francisco, Cal.

Dear Sir:

After consultation with Mr. McEnerney, I have decided that it would not be advisabe to enter into the proposed stipulation. I, therefore, return it to you herewith.

Yours very truly,
(Signed) JOHN S. PARTRIDGE."

JSP/D.

The stipulation referred to in said letter and returned therewith was the form of stipulation waiving citation last above mentioned. This letter, not mentioned in the affidavit of said Judge, was written and delivered after the letter quoted in said affidavit.

*The cause of action with which said Judge is proceeding is for the foreclosure of a mortgage securing

*Clerk's Note: See page 168 for amendment to Petition, allowed by order of Court entered May 3, 1916.

the payment of Fifty Million ($50,000,000) Dollars of bonds of the Western Pacific Railway Company. Said Judge intends to and will in said proceeding fix and determine the up-set price for which the said property is to be sold; that said Judge will also pass upon and determine the question of the right of the petitioner, Savings Union Bank & Trust Company, to intervene in said cause. Said Judge will also in said cause pass upon and determine the compensation to be paid to John S. Partridge, counsel for the receivers and counsel for the said Judge, as herein stated.

A Plan and Agreement for the reorganization of the properties of the Western Pacific Railway Company has been framed, which Plan holders of approximately Forty-three Million Nine Hundred Thousand ($43,900,000) Dollars par value of bonds have joined in and agreed to carry out, and holders of approximately Two Million Five Hundred Thousand ($2,500,000) Dollars par value of bonds have agreed to co-operate in carrying out; that the said Plan and Agreement was declared operative on the 15th day of March, 1916; that such Plan and Agreement contemplates the purchase at foreclosure sale in the interest of such bondholders as shall be willing to participate therein of all the properties covered by such First Mortgage, and the issue by the purchaser forthwith of Twenty Million ($20,000,000) Dollars par value of bonds to be secured by a first lien upon the properties so purchased. In order that such Plan and Agreement might be carried out according to its terms, it was essential that a fair market for such bonds, when issued and offered for sale should

be assured. To that end, an underwriting syndicate has been formed, and has agreed to insure the sale of such bonds at a price and upon terms which are believed to be more favorable than can again be secured, and by the terms of such underwriting agreement the underwriting syndicate is entitled to call for the bonds, the sale of which is insured by it, on or before July 1, 1916. If, through delay in the entry in said suit of your petitioner against Western Pacific Railway Company of a decree of foreclosure and sale and the enforcement of such decree it shall become impossible to carry out such Plan and Agreement prior to July 1, 1916, so that the benefit of such underwriting may be availed of, such holders of such bonds who shall have joined therein will be liable to a charge of over One Hundred Fifty Thousand ($150,000) Dollars, and in other respects will sustain irreparable loss and injury, for the reason that it is extremely doubtful whether a new underwriting can be obtained on terms as favorable as those now existing.

That your petitioner is without remedy by appeal, and there is no means or relief open to your petitioner unless by a Writ of Mandate of this Court.

WHEREFORE, your petitioner prays that a rule may be made and may issue from this Honorable Court, directing the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division, to show cause before this Court why a Writ of *Mandamus* shall not issue commanding him to enter an order in said cause that an authenticated copy of

such affidavit shall be forthwith certified to the Senior Circuit Judge for this Circuit then present therein.

And your petitioner does further pray that, pending the hearing and disposition of said order to show cause, said Judge be restrained and enjoined from taking any steps or proceedings in said cause, and for such other and further relief as to this Honorable Court may seem just and meet. And your petitioner will ever pray.

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
Counsel for Petitioner.

State of Oregon,
County of Multnomah,—ss.

I have read the foregoing petition by me subscribed. The facts stated therein are true.

JARED HOW.

Subscribed and sworn to before me this tenth day of April, 1916.

[Seal] FRANK L. BUCK,
Notary Public in and for the State of Oregon.
My commission expires November 4, 1916.

Exhibit I [to Petition for Mandamus—Affidavit of Lyman Rhoades of Personal Bias and Prejudice, Filed Pursuant to Section 21 of the Judicial Code].

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 169—IN EQUITY.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

State of New York,
City and County of New York,—ss.

Lyman Rhoades, being first duly sworn, deposes and says:

I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and par-

ticularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company) and under that certain contract B hereinafter referred to.

II.

The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above entitled. Said Judge has a personal bias and prejudice against The Equitable Trust Company of New York, as trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various con-

troversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank & Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the "Savings Union") has sought to intervene in said cause, and to become a party thereto.

The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

III.

There are pending in said cause the following controversies and matters to which the Trust Company is a party.

1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against The Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price

shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called "Contract B," and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same. This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company,

and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

IV.

Holders of a large amount (namely, about $43,900,000 principal amount, out of $50,000,000 outstanding) of Western Pacific First Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about $3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said plan, said committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This plan, in the opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all pro-

ceedings under the mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

> " * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any particular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

> The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued."

In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said plan of reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge's taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

V.

The bondholders who have joined in the formation

of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advantage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only

in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

VI.

As a consequence of the foregoing considerations, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called depend-

ent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time, both said Receiver, Frank G. Drum, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said

Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus,* that said Judge and his said Receivers and counsel believe that the Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are

unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and the circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drum as Receivers under said ancillary bill without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

VII.

In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter, would have to determine and fix the up-set price to be named

in said decree, that is to say, the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price. if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only $50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements of value and all qualifying factors being considered,

—no more no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge constituted himself the special guardian and champion of said minority bondholders.

On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter's transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

> "The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them."

As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in the aggregate to approximately nine thousand ($9,000) dol-

lars principal amount, and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand ($3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows:

1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; (prevailing price) January 36, February 32.

The market price of said bonds on March 1, 1914, was approximately 68.

I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale

was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

VIII.

Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments Said bonds came into default, and the foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is

responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

> "When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn't get my money back, I would say, 'Well, considering that I have been robbed of my money, I think the best thing that can happen to you is to be thrown into bankruptcy, so that you won't do it to anybody else another time.' "

IX.

Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause and its said obligations be ascertained and if possible enforced. I quote from said colloquy as follows:

> "The COURT.—* * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshalling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never

be necessary to sell the property of the Western Pacific.

Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

The COURT.—That does not answer the question. The question is, what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible and is able to respond there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations.

The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets."

X.

Said Judge, at the time of the appointment of Receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr., as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr., upon behalf of said Receivers that the

then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

On the hearing on March 6, 1916, of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

> "The COURT.—* * * The Court is responsible for the administration of this property. Its avenue of aid and of enlightenment is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course

which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right."

Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

XI.

On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its application for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced, and had taken all said proceedings for the purpose of enabling the Denver Company to escape the perform-

ance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company's First and Refunding Mortgage, and said Company's Adjustment Mortgage; that said firms of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent.*

Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the

defense of said applications for writs of prohibition and *mandamus*, and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one of acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing in as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said

John S. Partridge, as counsel for said Receivers, to join all of the parties to this said cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus;* but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered *ex parte* an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

> "It appearing that the Equitable Trust Company of New York, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;
>
> And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;
>
> It is ordered that the said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.
>
> WM. C. VAN FLEET,
> United States District Judge."

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said Receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus,* although said applications were not opposed by any of the parties to said cause. Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctional order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus,* upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said con-

troversy concerning said claims against the Denver Company and to postpone a decree in this said cause until such controversy had been adjudicated), to prevent the expression of the judgment of said Circuit Court of Appeals upon said questions and to proceed with said cause irrespective of the propriety or impropriety of the course which he had determined to adopt with reference to said matters.

Upon consideration of the facts as I have learned the same from an examination of the records in this cause, and in said Circuit Court of Appeals, and of the facts outside said records above stated, I am convinced and believe that said Judge is determined if there be any way available to him so to do, to compel the prosecution of said claims against the Denver Company before him in this cause, and that he entertains a deep resentment against said Denver Company, and that he believes (although as I verily believe, there is no foundation whatsoever for the belief), that said banking houses above named have conspired, as is charged by said Savings Union, to protect the Denver Company and the holders of certain of its bonds, against the claim of Western Pacific bondholders, at least in some part, and that said Reorganization Committee and the Trust Company are co-operating with them in so doing and that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low up-set price to be fixed by the decree herein, and that said Judge has acquired and entertains a personal bias and prejudice against it on account of said matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds, to wit, about $43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to $18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said

date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplates the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in connection with said Railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said Company, either with respect to interest payments or sinking fund payments at any such sale, or in this

cause at all, and I am advised by counsel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B,

delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and said Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B, must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said judge proposd to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part

thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon said Denver Company and said Missouri Pacific Railway Company, and said Companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in this said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with seasonable promptness, counsel for the Trust Company prepared and, as hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this said cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February 21 and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said

cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this said court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that

said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committee in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by counsel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications, counsel for complainant, who has appeared thereon, has frequently objected to the making of any such orders if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were

originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation, stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committee called upon said Judge at his Chambers, and represented to said Judge that the primary object of maintain-

ing said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrasssment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were consented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drum as one of the Receivers of Western Pacific railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Part-

ridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, on his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against the Trust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the

instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecution of said New York suit, and upon said applications for writs of prohibition and *mandamus,* took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in oppisition to the issuance of the writ of prohibition, and asked that it might be argued in connection with the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel

for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein, to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

The plaintiff is a New York corporation, having its principal offices in the city of New York, where

I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent on account of the prosecution of said New York suit without said Judge's permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for the Trust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916, with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior

to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of March, 1916, and had been acquiesced in, and apparently approved by, counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complain-

ant herein, which would cause him to persist in denying to the complainant the relief to which it is entitled in said cause and so seriously influenced him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As the result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant

herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and as at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from acting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be rendered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held

after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed to further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I, individually, and on behalf and as the authorized officer of said complainant, The Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and application to be entered on the records of the court, and also an order that an authenticated copy hereof shall be forthwith certified to the senior Circuit Judge for this Ninth Circuit, then present in said circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

Subscribed and sworn to before me this 29th day of March, 1916.

[Seal] MYLES M. BOURKE,

Notary Public, New York County No. 222, Register's Office No. 6148.

Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,

Counsel of Record for said Complainant, The Equitable Trust Company of New York.

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

An affidavit of personal bias and prejudice and application that another Judge shall be designated for further proceedings in this action, accompanied by a certificate of counsel of record for plaintiff herein that such affidavit and application are made in good faith, having been filed by said plaintiff in this action.

IT IS HEREBY ORDERED that the fact of the filing of such affidavit and application be entered on the records of the court and that an authenticated copy thereof shall be forwith certified to the Senior Circuit Judge for this circuit now present in the circuit, to the end that such proceedings may be had thereon as are provided by law.

Dated, this 3d day of April, 1916.

_____,

District Judge.

Exhibit II [to Petition for Mandamus Proceedings Had April 3, 1916, Re Motion to Disqualify, etc.].

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW YORK

vs.

WESTERN PACIFIC RAILWAY COMPANY, et al.,

Monday, April 3d, 1916.

REPORTER'S TRANSCRIPT.

INDEX.

Direct Cross Re D Re-X

AFFIDAVIT AND PROCEEDINGS ON MOTION TO DISQUALIFY, ETC.

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY, et al.,

Defendants.

Monday, April 3d, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee: JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyalton Railroad: Messrs. SLACK & GOODRICH.

For the Savings Union Bank & Trust Company: Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F. BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq.

The COURT.—Any *ex parte* matters?

Mr. HOW.—In the case of the Equitable Trust Company of New York vs. the Western Pacific Railway Company, there has been filed an affidavit to the effect that your Honor entertains personal prejudice against the plaintiff.

The COURT.—Against whom?

Mr. HOW.—Against the plaintiff.

The COURT.—A corporation?

Mr. HOW.—Yes, your Honor, the Equitable Trust Company of New York, the plaintiff in the suit.

The COURT.—What is the basis of it? I don't even know the plaintiff, except as a corporation.

Mr. HOW.—The affidavit is about 30 pages long. I received it this morning and have read it, and have certified it as counsel of record as having been made in good faith. I should hesitate to attempt to state to your Honor the full contents of it.

The COURT.—How do you propose that I become possessed of it?

Mr. HOW.—It has been filed.

The COURT.—Well, suppose it has? It must be presented to the Court in some way, must it not?

Mr. HOW.—Not under the statute. I suggest to your Honor that the statute, section 21 of the Judicial Code, provides that upon the filing of the affidavit the Judge shall take no further proceedings in the cause, but shall forthwith certify to the Senior Circuit Judge then in the circuit the fact that the affidavit has been filed, with a copy of the affidavit and the application. The application is for the des-

ignating of another judge for further proceedings in the cause.

The COURT.—The court would certainly not be justified in making any such order until he saw that the affidavit was one that the statute contemplated.

Mr. HOW.—I think that the Circuit Court of Appeals for this circuit has held that the matter of whether the affidavit is sufficient, or not, is not for this Court to determine.

The COURT.—Well, you had better present authorities on that.

Mr. HOW.—I suggest to the Court that the affidavit has been filed, and I suggest to the Court that the Court can take no further proceedings in the action, and I submit to your Honor the form of an order.

The COURT.—I would not be disposed to acquiesce in that view unless you have some authorities on the subject.

Mr. HOW.—I am not prepared with authorities, your Honor, now. I filed this this morning forthwith upon receiving it, under instructions.

The COURT.—Then I will request you to read it. The mere filing of the affidavit does not satisfy the statute. Of course, if it is a mere attack upon a Judge growing out of the fact that a party thinks it will be prejudiced by reason of permitting it to remain with him, that is one thing; if it is a matter of substance, that is another thing. Of course, no Court can be expected to sit silent and permit an attack of that kind to be made upon it without knowing what it is; it cannot fold its hands and surrender

its jurisdiction if it is properly exercising it. The mere filing of an affidavit does not satisfy the statute. It depends upon what the affidavit is. Of course, it always has been held, so far as my observation is concerned, that so far as it tends to disclose any facts upon which prejudice may be predicated, the Judge assailed is entitled to file a response, file a statement of what the fact is. It would be a monstrous proposition if a party, merely because they might have in view some other person or some other tribunal that would be subservient to their interests could attack a Judge merely for the purpose of disqualifying him.

Mr. HOW.—I understand your Honor wants me to read this affidavit?

The COURT.—Yes.

Mr. HOW.—I protest against doing that, because I think the filing of the affidavit is all that is required. I am quite willing to read it, though.

The COURT.—Well, I am not insistent on subjecting you to the physical task of reading the affidavit, Mr. How, but I must be made acquainted with its contents.

Mr. HOW.—Oh, I don't mind the physical part of it at all, your Honor. I will read it.

"*In the District Court of the United States, in and for the Northern District of California, Second Division.*

IN EQUITY—No. 169.

"THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

"WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

"AFFIDAVIT OF PERSONAL BIAS AND PREJUDICE, FILED PURSUANT TO SECTION 21 OF THE JUDICIAL CODE.

"State of New York,

"City and County of New York,—ss.

"Lyman Rhoades, being first duly sworn, deposes and says:

"I.

"I am one of the vice-presidents of The Equitable Trust Company of New York (hereinafter called also the Trust Company), being The Equitable Trust Company of New York, as Trustee, named as plaintiff in the above-entitled action. I make this affidavit for and on behalf of said The Equitable Trust Company of New York, and of said Trust Company, as such Trustee and plaintiff. I am in charge of the Trust Department of said Trust Company, and particularly in charge of the matter of executing the trusts vested in said Trust Company, and I am in

charge of the execution of the trusts vested in said Trust Company by and as Trustee under the First Mortgage of the Western Pacific Railway Company (hereinafter sometimes called the Railway Company), and under that certain Contract B hereinafter referred to.

"II.

"The above-entitled cause is a suit for the foreclosure of the First Mortgage of the Railway Company, and is now pending in the United States District Court, for the Northern District of California, and in the Second Division of said court, and the Hon. William C. Van Fleet is the regularly presiding Judge in said Division and cause, and has exclusive control of all matters arising in said cause. Said William C. Van Fleet, Judge of said court before whom said cause is pending, has a personal bias and prejudice against The Equitable Trust Company of New York, the plaintiff in said cause above-entitled. Said Judge has a personal bias and prepudice against The Equitable Trust Company of New York, as Trustee and as plaintiff in the above-entitled cause. Said Judge has a personal bias and prejudice in favor of Frank G. Drum and Warren Olney, Jr., as Receivers of Western Pacific Railway Company appointed in said action, and John S. Partridge, their counsel, who have by their actions, hereinafter recited, and under the authority, or with the acquiescence of the Court, become parties to various controversies which have arisen in said cause, and to which the Trust Company is also a party. Said Judge has a personal bias and prejudice in favor of the Savings Union Bank &

Trust Company, which said Savings Union Bank & Trust Company (hereinafter called the 'Savings Union') has sought to intervene in said cause, and to become a party thereto.''—

The COURT.—That evidently was made before the decision of the Circuit Court of Appeals, wasn't it?

Mr. HOW.—It was made on the 29th day of March, 1916.

The COURT.—That was the day on which the opinion was filed.

Mr. HOW.—Yes, it was.

The COURT.—So, the affidavit was really made before the opinion was filed.

Mr. HOW.—News of that opinion did not get to them until very late in the afternoon; I think this was in the mail at the time.

''The facts and reasons for my belief that such personal bias and prejudice exist are as follows:

''III.

''There are pending in said cause the following controversies and matters to which the Trust Company is a party:

''1. A proceeding initiated by said Judge upon his own motion to enjoin the Trust Company from prosecuting a certain suit by it commenced in the United States District Court, for the Southern District of New York, against the Denver & Rio Grande Railroad Company (hereinafter called the Denver Company) and others. This proceeding is being prosecuted by said Receivers and their counsel at the instance of said Judge, and defended by the Trust Company.

"2. An application by the Trust Company, as complainant herein, for a decree of foreclosure and sale of the property of the Railway Company subject to said First Mortgage. This application is opposed by said Receivers and their said counsel. Upon the hearing of said application, if the Court shall hear the same, the question of what, if any, up-set price shall be fixed as the minimum price to be accepted for the property to be sold, will necessarily arise.

"3. A proceeding initiated by the Judge upon his own motion to bring said Denver Company into this cause as a party defendant, and to determine in this said cause its liability under a certain agreement dated June 23, 1905, between The Denver & Rio Grande Railroad Company and the Rio Grande Western Railway Company (predecessors and constituent corporations of said Denver Company), the Railway Company and the Trustee under its said First Mortgage, commonly known and herein called 'Contract B,' and, if possible, to enforce the same. (Copies of said Contract B have been filed in this cause and are part of the record therein, and I pray leave to refer to the same as if a full copy thereof were incorporated in this affidavit.) Such liability arises from an obligation upon the part of the Denver Company to pay to the Trust Company for the holders of said First Mortgage bonds the difference between the amount due from the Railway Company for interest and sinking fund payable upon its said First Mortgage bonds, and the amount actually paid by the Railway Company on account of the same.

This proceeding is being conducted by the Receivers and their counsel by direction of the Court, and is opposed by the Trust Company.

"4. An application of said Savings Union to be permitted to intervene in said cause, in order that it may participate in the prosecution thereof, and particularly of said claim against the Denver Company, and oppose the entry of any decree in said cause until said claim be disposed of, and when a decree shall be entered, to procure the fixing of the largest possible up-set price. The granting of said application is opposed by the Trust Company.

"IV.

"Holders of a large amount (namely, about $43,900,000 principal amount, out of $50,000,000 outstanding) of Western Pacific Mortgage bonds have joined in forming a Reorganization Committee, and adopting a Plan and Agreement for the reorganization of the Railway Company. Another committee has been formed in Amsterdam, Holland, by holders of such First Mortgage bonds, principally resident in Holland, and represents, as I am informed and believe, about $3,000,000 principal amount, of such bonds; and while said committee has not as yet acted in approval or disapproval of said Plan, said Committee, in the matters which have arisen in connection with the suit brought by the Trust Company in the United States District Court for the Southern District of New York and the attempt of said Judge to prevent the prosecution thereof and matters consequent thereon, has acted in co-operation with said Reorganization Committee. This Plan, in the

opinion of the Trustee, is a proper and fair plan. All bondholders have been and are at liberty to join therein, and said Plan, in the opinion of the Trustee, in no way tends to prejudice the rights or interests of such bondholders as do not join therein. Said First Mortgage provides that the Trustee, in all proceedings under the Mortgage, shall obey the directions of the holders of a majority of said bonds, and the Trustee is co-operating with, and as in duty bound, is receiving and obeying the instructions as to such proceedings from said Reorganization Committee, as the holders of a majority in amount of said bonds. It has not, however, received any instructions, or taken any proceedings, which operate to the advantage of one set of bondholders as distinguished from another. The Judge, nevertheless, identifies the Trust Company with the Reorganization Committee, and, as appears from a colloquy between the Judge and counsel, which took place in open court on March 6, 1916, apparently regards the Trust Company as in reality not acting for the bondholders who have not joined in said Plan, and as the representative solely of the bondholders who have joined therein. On that occasion, the Judge said, referring to the Trust Company's application for a decree of foreclosure and sale herein, to be made for the benefit of all of the holders of said First Mortgage bonds:

"' * * * Now, the Court unquestionably proposes to have such light upon the situation as will enable it to proceed in accordance with the rights of all the parties here concerned, because the Court is not here alone sitting to adjudicate rights of any par-

ticular lot of bondholders, or section of bondholders; it must protect them all, the smallest with the largest, the greatest with the least. * * *

" 'The COURT.—The Court is in this position: It is just as much bound, as I have indicated, to protect the rights of those bondholders who have seen fit to stand out and not subscribe to the reorganization scheme as those who have subscribed. * * * ' "

The COURT.—Do they controvert that proposition?

Mr. HOW.—I would rather read the affidavit.

The COURT.—Well, proceed.

Mr. HOW.—(Reading:) " 'Now, they are before the Court; this Court is obligated to protect their rights equally with that of any body of bondholders who may desire a different course to be pursued. '

"In making this statement, and other like statements, the Judge clearly implied that the Trustee was acting only in the interest of bondholders who had joined in said Plan of Reorganization, and was not caring for all of the bondholders, as it is in duty bound to do, and as in fact it is doing.

"Counsel for the Judge, upon the hearing on March 16th and 17th, 1916, of applications to the Circuit Court of Appeals, for the Ninth Circuit, for writs of prohibition and mandate, intended to prevent the Judge's taking in this cause said proceedings against the Denver Company and to compel the entry of a proper decree of foreclosure and sale, which applications were made by the Trust Company, clearly intimated in argument, as I am informed by counsel for the Trust Company there present, that the Trustee

could not be trusted, in the opinion of the Judge, to act fairly and impartially in protecting the interests of said minority bondholders, as well as the interests of the majority bondholders.

"V.

"The bondholders who have joined in the formation of the Reorganization Committee and the Trustee have been advised by their respective independent counsel, and are of the opinion, that the obligations under Contract B of The Denver Company to the Trustee and the bondholders, in respect to the making of interest and sinking fund payments, are not subject to said First Mortgage, and in this suit for the foreclosure thereof no decree is sought for the sale or other disposition of said last-mentioned obligations. It is, and at all times has been, the desire of the said bondholders (hereinafter called the majority bondholders) that the property of the Railway Company shall at once be sold, and if a proper price cannot otherwise be realized therefor, that the same shall be purchased in the interests of such of the bondholders as may join in said Plan of Reorganization, and shall be improved and operated for their benefit as stockholders of a new corporation, to be formed for the purpose. It is also their desire and intention, if so permitted, that the said claim against the Denver Company shall survive in the hands of the Trust Company, as Trustee under Contract B, in order that such new corporation may, if possible, by negotiations with the Denver Company, realize therefrom, so far as such claim pertains to the bonds of said majority bondholders, the greatest possible advan-

tage to said new corporation and its stockholders (now said bondholders), it being the purpose of the majority bondholders to pursue the prosecution of said claim against the Denver Company, so far as it pertains to their said bonds, only in event that it shall prove impossible by means of negotiation to make a thoroughly satisfactory settlement thereof in the interest of such bondholders; but otherwise to insist upon the enforcement of the same. The majority bondholders believe, and the Trustee agrees, that the prosecution of said claim in court will almost certainly result in the insolvency and the appointment of receivers for the Denver Company, and that in consequence the entire benefit of said claim will be lost, unless the bondholders are prepared to protect themselves in the course of a reorganization of the Denver Company.

"VI.

"As a consequence of the foregoing consideration, the Trustee, acting as Trustee of the trust created by said Contract B, as it was advised that it was its right and duty to do, at the request of the majority bondholders (represented by a protective committee, which was the predecessor of the Reorganization Committee, as the representative of a majority in amount of said bonds, and was composed of the same individuals), in May, 1915, filed in the United States District Court, for the Southern District of New York, a bill in equity, denominated as a bill ancillary to the bill of complaint in said cause pending in this court, and procured the appointment as Receivers of the Railway Company in said District the same

persons who had been appointed Receivers thereof in this Northern District of California, and thereupon filed in said United States District Court, for the Southern District of New York, a so-called dependent bill, whereby the Trust Company sought as ultimate relief the enforcement of the said obligations of the Denver Company to all of said bondholders, but incidentally and primarily the enjoining of individual bondholders, whose bonds, or some of them, bore direct guaranties of interest payments endorsed thereon by the Denver Company, from enforcing said direct guaranties, inasmuch as the result of such enforcement would be to impair or impede the enforcement of the obligations of Contract B which run in favor of all holders of said Western Pacific First Mortgage bonds. (Such direct guaranties are endorsed upon only a portion of said bonds.) Upon the institution of said suit in New York, said Judge displayed resentment at the Trust Company's action in commencing the same without his permission. At the same time both said Receiver, Frank G. Drumm, and said counsel for said Receivers, John S. Partridge, were greatly disturbed, and stated, in substance, that they felt affronted by the action of the Trust Company, and expressly stated, in substance, that the action of said Trust Company was an affront to said Judge, and to themselves. Upon an application made shortly thereafter by said Receivers for instructions as to whether they should institute suit for the enforcement of the Denver Company's said obligations, said Judge of his own motion issued an order, directed to the Trust Company, to show cause

why it should not be enjoined from prosecuting or taking other proceedings in said suit pending in New York. And subsequently said Judge rendered an opinion, and of his own motion caused to be entered an order enjoining the Trust Company from taking any further proceedings in said cause, and likewise, although no application therefor had been made by anybody, enjoining the Trust Company from prosecuting said obligations of the Denver Company in any court save in the court of said Judge, or taking any action with respect to said obligations of the Denver Company, or which might affect the same, without the permission of said Court, that is to say, of said Judge. Subsequently, and upon the hearing of an appeal from said order taken by the Trust Company to the Circuit Court of Appeals for the Ninth Circuit and of said applications for writs of prohibition and *mandamus* above mentioned, said Judge, through his counsel, filed motions to dismiss all of the same, and demurrers to the petitions for such writs, and returns to the alternative writs, and thereby alleged and claimed that said proceeding to enjoin the Trust Company as above stated was in reality a proceeding in contempt, and that said Trust Company had been in contempt of said Judge and his said court, and has in effect, by the order of said Judge, been adjudged so to be in contempt. And said Judge and his said counsel have clearly intimated in connection with said proceedings for injunction, and for said writs of prohibition and *mandamus*, that said Judge and his said Receivers and counsel believe that the

Trust Company instituted said New York suit for the purpose of evading the jurisdiction of the Judge, and that the Trust Company and the majority bondholders are unwilling to confide their interests under said contract to the decision of said Judge, and I am informed by counsel for the Trust Company, and by counsel for the Reorganization Committee, who are familiar with the situation and circumstances, and I verily believe, that said Judge suspects and resents the conduct of the Trust Company in instituting said New York suit. Both said Judge and counsel for the Receivers have, on several occasions, reiterated and emphasized the complaint that the Trust Company instituted said ancillary suit and filed said dependent bill, and obtained the appointment of said Warren Olney, Jr., and Frank G. Drumm as Receivers under said ancillary bill, without the permission of said Judge, and without any authority from him so to do, although the fact is that it is not necessary nor customary in such circumstances to obtain the permission of the Judge of primary jurisdiction for the institution of suits in ancillary jurisdictions or for proceedings thereunder, and that in point of fact no umbrage was taken by said Judge on account of the ancillary proceedings and appointment of Receivers in the District of Utah, in the Eighth Circuit, which have been actually instituted without such permission for the foreclosure of said mortgage.

"VII.

"In connection with the entry of the decree of foreclosure and sale to be entered in this cause, said Judge, if he were permitted to pass upon the matter

would have to determine and fix the up-set price to be named in said decree, that is to say the minimum amount for which the mortgaged property may be sold under such decree, which said up-set price, if the amount for which the property is in fact sold shall not be higher by reason of competitive bidding, will determine the amount of the distributive shares of holders of said Western Pacific First Mortgage bonds and therefore, if the property be purchased by or at the instance of the Reorganization Committee for the benefit of the majority bondholders, the amount which the majority bondholders shall be compelled to pay to each of the minority bondholders for his or her interest in the mortgaged property; such bondholder, however, retaining his or her claim against the Denver Company under Contract B for the interest already accrued, unpaid and unprovided for and for the interest and sinking fund payable upon the portion of the bond principal not paid through the application of the proceeds of such sale. Inasmuch as the Denver Company's obligation under Contract B is only to make up deficits in interest payments and sinking fund payments of only $50,000 per year, it is manifest that the interest of the minority bondholders is to compel the majority bondholders to pay the highest possible price for the mortgaged property. The interest of the majority bondholders is to obtain the mortgaged property for the lowest possible price. The duty of the Trust Company is to do everything fairly possible to compel the majority bondholders to pay the full and true value of the property at the time of sale, all elements

of value and all qualifying factors being considered—no more and no less—and this duty the Trust Company is prepared and intends fully to perform. As will appear hereinafter, said Judge has constituted himself the special guardian and champion of said minority bondholders.

"On June 29, 1915, upon the argument of the question whether the prosecution of said New York suit by the Trust Company should be enjoined, raised upon an order to show cause issued at the instance of said Judge, the following statement was made by said Judge as shown by the reporter's transcript of said proceedings. (The statement refers to Western Pacific First Mortgage Bonds.)

" 'The COURT.—I got five of them myself soon after they were issued, in 1910 I think. I paid ninety-five for them, I think. I am mistaken about the price I paid. I think I paid par for five of them and when I sold them I sold them for ninety-five. I had occasion to sell a couple of them soon after I bought them for ninety-five and the others I gave to Mrs. Van Fleet and I think she got a very little for them.

"As shown by the income tax certificates then in the possession of the Trust Company as Trustee under said Mortgage, various members of the immediate family of said Judge, being the wife and children of said Judge, and being also members of his household, were, from the 1st day of March, 1914, until after the 1st day of September, 1914, severally owners in various amounts of First Mortgage bonds of Western Pacific Railway Company, amounting in

the aggregate to approximately nine thousand ($9,000) dollars principal amount"—

The COURT.—When was the bill filed?

Mr. HOW.—The 2d of March, 1915.

The COURT.—I knew they had disposed of them before that date; I thought that this ran into the period.

Mr. HOW.—(Continuing.) "—and a sister-in-law of said Judge, who is a member of his household, was at the same time the owner of First Mortgage bonds of said Railway Company in the principal amount of three thousand ($3,000) dollars. I am credibly informed, and on such information state, that said bonds, three whereof seem to be the bonds mentioned by said Judge as aforesaid, were purchased by or for the persons so owning the same several years prior to said year 1914, and all thereof in or about the year 1910, and until the same were disposed of, as hereinafter stated, were owned by them. The market price of said bonds, as shown by a certain petition of said Savings Union, verified by John S. Drum, hereinafter mentioned, during the years 1910 to 1915, inclusive, were as follows: 1910: maximum 96, minimum 92; 1911: maximum 94, minimum 87; 1912: maximum 87, minimum 81; 1913: maximum 86, minimum 74; 1914: maximum 72, minimum 35; 1915: (prevailing price) January 36, February 32.

"The market price of said bonds on March 1, 1914, was approximately 68.

"I am credibly informed that all of said bonds, except said bonds belonging to the sister-in-law of said

Judge, were disposed of by or for their said owners late in the month of February, 1915, approximately one week prior to the commencement of this cause, at which time it was a matter of common knowledge that this cause was about to be commenced in this, the court of said Judge. As I am informed that the market price of said bonds at the time of said sale was approximately 33, the loss suffered by the owners of said bonds through the purchase and disposition thereof as aforesaid must necessarily have amounted to several thousand dollars. I have no positive knowledge that said bonds of the said sister-in-law of said Judge have not been disposed of by her, but I have made inquiry concerning said matters, and have been unable to ascertain that the same have been disposed of, and upon the contrary, I am informed and believe that his said sister-in-law was the owner of said bonds subsequently to the promulgation of the above-mentioned Plan of Reorganization, which was not adopted until after December 15, 1915, and that she has not deposited the same under said Plan.

"VIII.

"Said Railway Company never in any year made net earnings sufficient to pay as much as one-half of the amount due as interest upon its said First Mortgage Bonds, or to pay any of the amount payable into the sinking fund therefor. Said bonds were sold to the public largely upon the faith of the obligation assumed by the Denver Company in said Contract B to make said interest and sinking fund payments. Said bonds came into default, and the

foreclosure of said First Mortgage became necessary, because the Denver Company ceased, in March, 1915, to pay the interest upon said bonds, or to make up the deficit in interest payments thereon, although previously it had made up all such deficits. As a consequence, holders of Western Pacific First Mortgage bonds generally (both minority and majority bondholders) have felt that the Denver Company is responsible for the losses which they have suffered through the purchase and subsequent depreciation of said bonds.

"Upon the argument of said applications for writs of prohibition and *mandamus* above mentioned, counsel for said Judge, by innuendo, plainly intimated, as I am informed by counsel for the Trust Company there present, that the Trust Company (because opposed to bringing about unnecessarily a receivership of the Denver Company) was and is in collusion with the Denver Company to prevent the enforcement, or the full enforcement, of the obligation of the Denver Company with respect to said interest and sinking fund payments, and one of the counsel for said Judge in arguing said matter, and addressing the United States Circuit Court of Appeals, for the Ninth Circuit, in behalf of said Judge, said:

" 'When the first day of March passed, the Denver & Rio Grande owed a million and a quarter dollars in respect of its guaranty to pay that coupon interest, the date preceding the filing of the bill here involved. There was no idea of asking it to pay. It is a going concern. We have been told that if we

are ruthless we will drive it into bankruptcy. Well, if I owned any of the Western Pacific bonds which had been palmed off on me by the Denver & Rio Grande, and I couldn't get my money back, I would say, "Well, considering that I have been robbed of my money, I think the best think that can happen to you is to be thrown into bankruptcy, so that you won't do it to anybody else another time." ' "

The COURT.—Does it say I said that?

Mr. HOW.—No, your Honor, that counsel for your Honor said that in argument.

The COURT.—I was wondering where I said that, although taken in connection with other matters stated in the affidavit, I would not be surprised if he had stated that I did say that.

Mr. HOW.—(Continuing.)

"IX.

"Upon the rendition by said Judge of his opinion directing the entry of an order enjoining the prosecution by the Trust Company of said New York suit, said Judge, of his own motion, directed that the Denver Company and the Missouri Pacific Railway Company be made parties to this cause, and intimated in said opinion that the obligations of the Denver Company to the Western Pacific bondholders under Contract B should be ascertained in this cause. Subsequently, on March 6, 1916, in connection with the application for the entry of a decree in this cause above mentioned, said Judge, in the course of a colloquy with counsel, stated, or plainly implied, that in his opinion the Denver Company should, if possible, be compelled to appear as a party in this cause

and its said obligations be ascertained and if possible enforced. I quote, from said colloquy as follows:

" 'The COURT.— * * * I think the Court has intimated sufficiently throughout the long argument that was had, and the discussion of that order to show cause, and what it says in its opinion as well, that in its view there can be no competent marshalling or fixing of the value of this property for the purposes of sale, for the essential purpose of fixing an up-set price, without construing the extent and character of the guarantee given in that contract by the Denver & Rio Grande, because if that contract carries a right of protection to the extent that is contended on one side that it does, it might never be necessary to sell the property of the Western Pacific.

" 'Mr. HOW.—That protection has not been afforded; if it had been, the mortgage of the Western Pacific would not have gone in default.

" 'The COURT.—That does not answer the question. The question is what are the rights of the bondholders of the Western Pacific under that contract; and if they are such as are seriously claimed for them, counsel can readily perceive that if the Denver & Rio Grande can be held responsible, and is able to respond, there would be nothing left here as requiring a sale of the physical properties of this road to meet those obligations. * * *

" 'The COURT.—But the Court is bound itself to realize on the security that is submitted to its charge. It cannot turn over to anybody the obligation which rests upon it to marshal these assets.'

"X.

"Said Judge, at the time of the appointment of receivers in this cause, was requested by the parties thereto, no one dissenting, to appoint Warren Olney, Jr. as Receiver of the defendant Railway Company, but said Judge, of his own motion, and in order, as he explained, to have as Receiver some one with whom he was well acquainted, and in whom he had personal confidence, appointed also Frank G. Drum as a Receiver with Warren Olney, Jr., and thereafter, although it was represented to him by said Warren Olney, Jr. upon behalf of said Receivers that the then existing legal department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to the receivership, appointed John S. Partridge counsel to the Receivers, stating, in effect, that he wished in that position a person with whom he was personally acquainted, and upon whom he could implicitly rely. As I am informed by counsel with whom I have consulted on this matter, said Judge had formerly been a partner in the firm of which said Partridge is a member, and the son of said Judge was at the time of such appointment, and still is, an attorney employed by and associated with said Partridge in his private practice.

"On the hearing on March 6, 1916 of said application for a decree of sale, which would necessarily have been for the benefit of all of the said bondholders (there being then no creditors claiming any preference over or claiming to share equally with said bondholders, except two creditors, who consented to

such decree), said Judge stated, despite the protest of counsel for the Trust Company, that he would not pass upon said application without hearing counsel for the Receivers, and made the following statement:

"'The COURT.— * * * the Court is responsible for the administration of this property. Its avenue of aid and of enlightenment, is not only counsel for the respective parties, but the counsel for the Receivers and the Receivers themselves. The Court does not propose to make any order in this matter without such enlightenment as will enable it to take a course which, in its judgment, is going to redound to the safeguarding and the benefit of the bondholders of this road. * * *

"'I feel that, inasmuch as these Receivers represent the Court, and through their counsel are the mouthpiece of the Court, for its information and for its guidance with reference to the rights of those whose interests have been committed to the keeping of the Court, that they have a right to be heard here. I shall most assuredly give them that right.'

"Upon the hearing of the return to said order to show cause why the prosecution of said New York suit should not be enjoined, said John S. Partridge, appearing in support of the order *nisi* which had been entered by said Judge upon his own motion, argued not only that the Denver Company should be made a party defendant to this cause, but that its said obligations could be ascertained and enforced in this cause, and that an equitable lien upon its property could be declared and enforced therein, and that, if

necessary, said First Mortgage of the Railway Company could be foreclosed as a mortgage in equity upon all of the property of the Denver Company.

"Upon said application for decree on March 6, 1916, said John S. Partridge, appearing as counsel for said Receivers, in consequence of the insistence of said Judge that he should and would require the views of said Receivers and their said counsel as to the granting or denial of said application, opposed the entry of a decree until the obligation of the Denver Company should have been adjudicated and if possible enforced.

"XI.

"On said 6th day of March, 1916, after the application for said decree, said Judge adjourned the hearing of said application until two o'clock in the afternoon of said day, for the purpose of hearing counsel for the Receivers as aforesaid, and upon the hearing of said matter later in said day, said Savings Union applied for leave to be heard concerning the fixing of an up-set price in connection with said decree—a subject concerning which, as I am informed, Courts are accustomed to receive the views of interested parties without permitting them to become parties to the cause. Thereafter said Judge continued said matter for one week, in order, as he stated, to enable said Receivers to present affidavits in connection with the same, and thereafter said Savings Union presented a petition for leave to intervene as a party to said cause, and to prosecute the same and participate therein as above stated, and in said complaint of intervention, and as ground for its applica-

tion for leave to intervene, charged, in substance, that said Reorganization Committee is controlled by the firms of Blair & Co., William Salomon & Co., and William A. Read & Co. (bankers in the city of New York); that the Trust Company is controlled by the Reorganization Committee; that said firms of bankers last mentioned had caused the Denver Company to default in the performance of its said obligations; had caused this foreclosure suit to be instituted; had caused said New York suit to be commenced,—"

The COURT.—Does it say the Court stated that?

Mr. HOW.—No. It says that is the ground of the claim of the Savings Union Bank & Trust Company for leave to intervene, as set forth in its petition for intervention.

The COURT.—Oh, yes.

Mr. HOW.—(Continuing.) "—and had taken all said proceedings for the purpose of enabling the Denver Company to escape the performance of its obligations to Western Pacific bondholders under Contract B, and for the purpose of defeating any claim that might be made that the claims of the Western Pacific bondholders under Contract B constituted an equitable lien upon the property of the Denver Company in priority to the liens of said Company's First and Refunding Mortgage, and said Company's Adjustment Mortgage; that said firm of bankers were interested, directly or indirectly, in the bonds of the Denver Company secured by said First and Refunding Mortgage and said Adjustment Mortgage, and entertained the purpose of protecting said bonds as against the interests of Western Pacific

bondholders represented by the Reorganization Committee and the Trust Company; and that the Reorganization Committee and the Trust Company are betraying the interests of their respective *cestuis que trustent.*

"Upon the hearing of said applications for writs of prohibition and *mandamus* in the United States Circuit Court of Appeals, counsel for said Judge argued that one reason why said Judge should not be compelled to enter a decree of foreclosure and sale in this cause is that said application of the Savings Union for leave to intervene and file said complaint had been made, and the clear implication of said argument was that said application ought to be and would be granted by said Judge and so granted because the Trust Company had shown unfairness and partiality in the administration of its trust, and did not and could not properly represent the minority bondholders in the prosecution of this cause. In the defense of said applications for writs of prohibition and *mandamus,* and in the argument thereof, counsel for said Savings Union, and counsel for said Judge, co-operated, and despite the fact that said charges of fraudulent conspiracy made in said proposed complaint in intervention were repeated in open court by counsel for said Savings Union, in the presence of counsel for said Judge, said statements were in no way repudiated by counsel for said Judge, or doubt concerning the same expressed, but, upon the contrary, the attitude of counsel for said Judge upon said hearing was one acquiescence in and of endeavor to support said charges.

XII.

Said applications for writs of prohibition and *mandamus* were heard in connection with an appeal taken by the Trust Company from the order of this Court, entered upon the opinion of said Judge, enjoining the Trust Company from prosecuting said New York suit, and directing the bringing as parties defendant of the Denver Company and said Missouri Pacific Railway Company. Said Receivers not being parties to said cause were not cited to appear as appellees upon said appeal, and, although the hearing of said appeal in connection with the application for said writs of prohibition and *mandamus* was consented to by all of the parties to said cause, the same was not consented to by said Receivers. Upon the contrary, at the time that the Trust Company was about to take its said appeal from the order of said Judge enjoining the prosecution of said New York suit, counsel for the Trust Company applied to said John S. Partridge, as counsel for said Receivers, to join all of the said parties to this cause in waiving the issuance of citation upon said appeal, and in stipulating that said cause might be heard on March 16, 1916, together with the applications for said writs of prohibition and *mandamus;* but said John S. Partridge notified counsel for the Trust Company that, after consultation with Garret W. McEnerney, Esq., special counsel for said Receivers and for said Judge, he had decided that it would not be advisable to enter into such stipulation, and refused so to do. Prior to the hearing of said appeal and said applications, said Judge entered

ex parte an order in this cause, directing counsel for said Receivers to appear upon said appeal, and to oppose the same, the body of which said order reads as follows:

"It appearing that the Equitable Trust Company of NewYork, plaintiff in the above-entitled cause, has taken an appeal from an order enjoining said The Equitable Trust Company from further proceeding with a certain ancillary and dependent action in the Southern District of New York;

And it appearing that the Receivers heretofore appointed in this cause have not been made parties to said appeal;

It is ordered that said Receivers be, and they are hereby authorized and directed to take any steps they may deem necessary to protect the jurisdiction of this Court upon the said appeal.

WM. C. VAN FLEET,
United States District Judge."

Although none of the parties to said cause objected to the hearing of said appeal or to the reversal of said order for injunction, said counsel for said receivers, acting in real substance, as counsel for said Judge appeared upon the hearing thereof and moved to dismiss said appeal and argued in support of said order.

And said Judge authorized counsel for the Receivers, and Garret W. McEnerney, Esq., a member of the San Francisco bar, to represent him in opposition to said applications for said writs of prohibition and *mandamus*, although said applications were not opposed by any of the parties to said cause.

Upon the hearing of said appeal and said applications, said counsel moved to dismiss said appeal upon the ground that the Receivers had not been made parties thereto or cited to appear thereon, and opposed the consideration of said appeal, upon the ground that the Court had not jurisdiction to review said injunctional order, because, as said Judge contended, said order constituted discipline for contempt and was not an injunction in the proper sense of that term, and opposed the consideration of said applications for said writs of prohibition and *mandamus,* upon the ground that the United States Circuit Court of Appeals had not jurisdiction to entertain the same, in all said matters indicating the plain intention of said Judge (notwithstanding a desire previously expressed by him, and which should have been entertained by him to obtain the judgment of said United States Circuit Court of Appeals concerning his jurisdiction to initiate and adjudicate herein said controversy concerning said claims against the Denver Company and to postpone a decree in this said cause until such controversy had been adjudicated), to prevent the expression of the judgment of said Circuit Court of Appeals upon said questions and to proceed with said cause irrespective of the propriety or impropriety of the course which he had determined to adopt with reference to said matters.

Upon consideration of the facts as I have learned the same from an examination of the records in this cause, and in said Circuit Court of Appeals, and of the facts outside said records above stated, I am

convinced and believe that said Judge is determined, if there be any way available to him so to do, to compel the prosecution of said claims against the Denver Company before him in this cause, and that he entertains a deep resentment against said Denver Company, and that he believes (although, as I verily believe, there is no foundation whatsoever for the belief), that said banking houses above named have conspired, as is charged by said Savings Union, to protect the Denver Company and the holders of certain of its bonds, against the claims of Western Pacific bondholders, at least in some part, and that said Reorganization Committee and the Trust Company are co-operating with them in so doing and that the Trust Company intends (although such is not its intention) to endeavor to secure an unduly low up-set price to be fixed by the decree herein, that said Judge has acquired and entertains a personal bias and prejudice against it on account of said matters and things, as well as the other matters and things hereinabove recited.

XIII.

Said Plan of Reorganization was adopted by said Reorganization Committee on December 17, 1915. A copy of said Plan and the Agreement annexed thereto was delivered by one of the counsel for the Reorganization Committee to said Judge, and a copy thereof to each of said Receivers, on or prior to December 24, 1915. Immediately thereafter, formal notices of the adoption of said Plan were published in various newspapers in the State of California, and lengthy summaries thereof and comments

thereon were published in most of the principal newspapers of said State, and particularly in the daily papers of San Francisco. Letters and notices were mailed by the Reorganization Committee to every bondholder whose name appeared upon the income tax certificate lists in the possession of the Trust Company, urging deposits of bonds under said Plan of Reorganization, and inasmuch as the names of the members of the family and household of said Judge who were holders of said bonds prior to the sale thereof in February, 1915, hereinabove mentioned, do appear upon said list, undoubtedly said circular letters were received by various members of the family and household of said Judge, and inasmuch as the said sister-in-law of said Judge was a holder of some of said bonds after the date of the promulgation of said Plan, and unquestionably received said circular letters, and a copy of said Plan was in the possession of said Judge, a knowledge of the contents of said Plan must necessarily have been acquired by said Judge.

Notice that the time for withdrawal of bonds deposited with the Protective Committee, which was the predecessor of said Reorganization Committee in representation of said bondholders, would expire six weeks from the date of the first publication of said Plan, to wit, on February 4, 1916, also was duly published as aforesaid, and notice that the time for deposits thereunder would expire on February 7, 1916, was so published, and was contained in said Plan. Immediately after said last-mentioned date the fact that a very large majority of said bonds,

to wit, about $43,000,000, had become subject to said Plan and Agreement of Reorganization, was published throughout the United States, and particularly in the city and county of San Francisco. The fact also that the financial requirements of said Plan, amounting to $18,000,000 in cash, had been fully underwritten, and money necessary for the carrying out of said Plan, and particularly for the extension of the lines of Western Pacific Railway Company in the State of California, and for the rehabilitation and betterment of its existing lines had been provided, was also so published, and was a matter of common knowledge. It also appeared by reference to said Plan, and the fact was published generally in the papers of the city and county of San Francisco, and was a matter of common knowledge, that if said Plan was to be carried into execution it would be necessary that the same be declared operative by said Reorganization Committee before March 15, 1916, and that if it should not be declared operative before said date it would cease to be binding upon the depositors thereunder and all such depositors would be at liberty to withdraw their bonds therefrom and said Plan would fail.

During the period which elapsed between December 24, 1915, and February 21, 1916, neither the Trust Company, nor any of the counsel for the Trust Company or said Reorganization Committee, nor anyone connected with any thereof, so far as I have been able to ascertain, ever was apprised in any manner that there was, or would be, any active opposition to the carrying out of said Plan. It was a matter

of common and necessary knowledge that a prerequisite to carrying out the same was the entry of a decree of foreclosure and sale in this said cause, and there was never, as I am informed and believe, any intimation during said interval that there would be any objection upon the part either of said Judge or of said Receivers, or of counsel for said Receivers, to the entry of such decree of foreclosure and sale.

Said Plan of Reorganization contemplate the sale under the decree of foreclosure and sale to be entered in this said cause of the rights of Western Pacific Railway Company as such under said Contract B, that is to say, rights under the traffic and trackage provisions of said Contract B, in *connection said* railway's other property, but does not require or contemplate in any contingency the sale of any of the rights of the holders of the bonds of said company, either with respect to interest payments or sinking fund payments at any such sale, or in this cause at all, and I am advised by consel for the Trust Company and said Reorganization Committee that there is no reason whatsoever, if said Judge were willing to direct such course to be pursued, that the said rights of Western Pacific Railway Company, whatsoever the same may be, should not be so disposed of (the rights of said bondholders surviving), and that in such event no bondholder will be prevented from causing his own claims to be enforced thereafter by the Trust Company, as Trustee, under said Contract B, and that if said Judge is of the opinion that the claims of said bondholders against said Denver Company should be ascertained by him, or

even enforced in this cause, proceedings to that end, if they be warranted at all, may be taken as well after decree of foreclosure and sale as before such decree.

Nevertheless, on February 21, 1916, said Judge, without allowing any party to this cause any opportunity to be heard concerning the desirability or consequence of such action upon the execution of said Plan of Reorganization, and notwithstanding that the prosecution of said New York suit had already been and then was stayed by a restraining order issued by said Judge at his own instance, and that said Judge had been advised by the petition of one S. C. Wright filed herein and on the same day denied by said Judge, of the Purpose of the Trust Company to apply for a decree of sale herein in advance of any attempt to enforce the claims of bondholders against the Denver Company under Contract B, delivered an opinion in the proceeding to enjoin the Trust Company from proceeding with said New York suit, wherein he directed an order to be entered enjoining said suit, and that said Denver Company and Missouri Pacific Railway Company be made parties defendant to this cause, and indicated his opinion that the obligations of said Denver Company to said bondholders under Contract B must be ascertained, and possibly enforced in this cause. In a colloquy between counsel for the Reorganization Committee and the Judge, there was also an intimation, although not very distinct, that said Judge would require said matters to be adjudicated in this cause before he would permit a decree of foreclosure

and sale to be entered therein.

At the time the opinion of said Judge was handed down, one of the counsel for the Reorganization Committee suggested to said Judge that the effect of the entry of the order directed in said decision so far as it would initiate new proceedings and would require new parties to be brought in, might be to interfere very seriously with the carrying out of said Plan of Reorganization, and would jeopardize the success of the same, and requested said Judge to delay the entry of that portion of said order until a hearing could be had, and a showing made to him, of the interest of the bondholders as a whole to have said Plan carried out and of the effect upon the success thereof of the order which said Judge proposed to enter. Said Judge, however, peremptorily refused to delay the entry of said order, or any part thereof, and directed the same to be entered, and directed counsel for said Receivers to cause the same to be served upon the said Denver Company and said Missouri Pacific Railway Company, and said companies to be brought into said cause as parties defendant thereto.

Subsequently, and in order that, if possible, an early decree of foreclosure and sale might be had in the said cause, as was absolutely requisite to the execution of said Plan of Reorganization, and in order that the parties in interest might be advised, as it was essential that they should be, whether said Judge would in fact permit a decree of foreclosure and sale to be entered with reasonable promptness, counsel for the Trust Company prepared and, as

hereinbefore stated, on March 6, 1916, caused to be presented to said Judge in open court a form of decree of foreclosure and sale, which said counsel had previously presented to all of the other parties to this cause, and to the only creditors claiming preferences therein, who, without exception, had consented and stipulated to the prompt entry thereof. Upon the hearing upon said application said Judge refused to enter said decree, stating, in effect, that until the United States Circuit Court of Appeals of the Ninth Circuit had disposed of said application for a writ of prohibition, which had been made between February and March 6, 1916, he would not pass upon the application for decree, and, in effect, that if his jurisdiction to adjudicate said claims against the Denver Company in this said cause was not denied by the Circuit Court of Appeals after hearing said application, he would not direct the entry of any decree until the matters of the bondholders' claim against said Denver Company should be disposed of by him. At the same time, said Judge, although requested so to do, refused either to direct the entry of said decree, or to deny the application for the entry thereof, although the suggestion that an order denying said application might be made was made to him with the avowed purpose that such denial of said application might be reviewed upon the merits by the United States Circuit Court of Appeals on a proceeding for *mandamus*. Said Judge manifestly intended to prevent such review, and the expression of the views of said Circuit Court of Appeals concerning the right of the parties to the entry of said decree.

From a consideration of the facts aforesaid, and also of the proceedings which have been taken, as stated elsewhere in this affidavit, to prevent the rendition of any judgment by the Circuit Court of Appeals preventing said Judge from carrying out his purpose to compel a litigation of said matters with said Denver Company in this court and cause, and compelling said Judge to enter a proper decree of foreclosure and sale herein, I am convinced that ,said Judge rendered said decision, and refused to permit the entry of said decree in the full belief that his said action would probably defeat the carrying out of said Plan of Reorganization and with the desire that such should be the result thereof, and that said Judge is personally opposed to said Plan of Reorganization, and is determined to defeat the same.

As in this affidavit above stated, said Judge is aware that the Trust Company, as in duty bound, has co-operated, in various proper ways, with said Reorganization Committee in the endeavor to carry out said Plan of Reorganization, and identifies said Trust Company with said Reorganization Committee, and believes that it is a partisan of said Plan, and of the bondholders who have joined therein, and I verily believe he has a personal prejudice against the Trust Company by reason, among other things, of its said co-operation with the Reorganization Committe in the endeavor to carry out said Plan of Reorganization.

XIV.

At various times during the administration of the receivership in this cause, as I am informed by coun-

sel for the Trust Company, counsel for the Receivers have submitted to the Court applications for orders authorizing the Receivers to adopt contracts, leases, or other arrangements, made by the Railway Company with third parties, and also applications for orders authorizing the Receivers to enter into contracts, leases, or other arrangements with third parties, for or in connection with the use of property. Upon said applications counsel for complainant, who has appeared thereon, has frequently objected to the making of any such order if the same purported to operate, or if the same could operate by their own force, beyond the period of the receivership. When such objections were originally made by counsel, said John S. Partridge, as counsel for the Receivers, took the position that said orders could, would and should so operate, but said Judge, after considering the question, stated that, in his opinion, the proper construction of said orders should be that they would not operate except during the period of the Court's control of the property through its Receivers, unless they should expressly provide to the contrary. Counsel for the complainant requested the Court either to incorporate such statement in each order, or to enter a standing order directing that such construction should be given to every such order in absence of a contrary declaration in the order itself. Said Judge, notwithstanding the fact that he had expressed the view above stated with respect to the proper construction of such orders and that said John S. Partridge had previously expressed a contrary view and that said orders did not by their terms contain any limitation,

stated that he would incorporate such statements in said orders, or make such standing orders, if, but not unless, said John S. Partridge as such counsel would consent thereto.

Shortly after said Judge, upon his own motion, directed the issuance of an order in this cause restraining the Trust Company from prosecuting said New York suit, pending decision upon the order to show cause why an injunction should not issue, counsel for the Reorganization Committe called upon said Judge at his chambers, and represented to said Judge that the primary object of maintaining said bill in New York was to obtain an injunction restraining the prosecution of suits against the Denver Company by individual bondholders suing upon direct guaranties, to the detriment of all other bondholders, and that the restraining order made in this proceeding was so broad that even this limited object could not be accomplished and said counsel suggested to the Judge that it was to the best interests of the bondholders as a whole so to modify the restraining order as to permit proceedings to be taken in the New York jurisdiction, for the sole purpose of obtaining injunctions against such suits by individual bondholders against the Denver Company which might create preferences or otherwise result in embarrassment to the bondholders as a whole, and counsel stated that the modification of the restraining order so as to permit injunctions to be issued against individual bondholders would further that end. The said Judge, nevertheless, stated that he would not make any order modifying the restraining order in any manner, unless such modification were con-

sented to by counsel for the Receivers, but also stated that if such modification were so consented to, the same would be made.

XV.

By reason of the facts above stated with respect to and connected with the appointment of said Frank G. Drumm as one of the Receivers of Western Pacific Railway Company, and the appointment of said John S. Partridge as counsel for said Receivers, and the action of said Judge in instituting, and of said Partridge in prosecuting, said injunction proceedings to restrain the prosecution of said New York suit, and the suggestion by said Partridge in argument of proceedings for bringing in the Denver Company as a party defendant in this cause, and the action of said Judge, of his own motion, in directing the same, and the declared purpose of both said Judge and said Partridge to compel an adjudication upon said claims against said Denver Company before the entry of decree herein, and the expressions of said Judge, hereinabove related, with respect to relying upon said Receivers and said counsel, and looking to them for information and guidance, and the action of said Judge, hereinabove related, in confiding the defense of said applications for writs of prohibition and *mandamus* to counsel for said Receivers, and particularly said John S. Partridge, and in directing said counsel to oppose the consideration of said appeal, and in permitting his said counsel to co-operate upon the hearing of said applications for writs of prohibition and *mandamus* with said Savings Union and its counsel, and

of the action of said Judge in submitting his judgment to, and following the wishes of, said John S. Partridge as counsel for said Receivers in said matters last above mentioned, I am led to believe, and do believe, that said Judge has a personal bias and prejudice in favor of said Receivers and their said counsel, as well as against theTrust Company.

XVI.

The complaint in intervention of said Savings Union was made and presented to the Court at the instance of John S. Drum, Esq., who is the president of said Savings Union and a stockholder therein, and who verified said complaint. Said John S. Drum is the younger brother of Frank G. Drum, who, as above stated, is one of the Receivers of the Railway Company appointed by said Judge, and one of the especially trusted representatives and confidential advisers of said Judge.

The hearing of the said appeal from the injunction directed by said Judge against the prosecutions of said New York suit, and upon said application for writs of prohibition and *mandamus,* took place before the United States Circuit Court of Appeals, for the Ninth Circuit, sitting in the city and county of San Francisco. At the opening of court on Thursday, the 16th day of March, 1916, counsel for said Savings Union stated to the Court that in connection with the applications for the writs of prohibition and *mandamus* he appeared on behalf of said Savings Union, and asked leave to file a petition in opposition to the issuance of the writ of prohibition, and asked that it might be argued in connection with

the whole matter, and the fact that an application of the Savings Union for leave to intervene in this said cause had been made was referred to by counsel for said Judge as a ground of objection upon his part to the granting of the writ of prohibition, and more particularly the writ of *mandamus* then applied for in said United States Circuit Court of Appeals, and both said facts were referred to in said newspapers, and must necessarily have come to the knowledge of said Judge. On Friday, March 17, 1916, counsel for said Savings Union again appeared, co-operating and as if associated with counsel for said Judge, and argued at length in support of their said petition for leave to intervene, making various charges of fraud and bad faith against the Trust Company, and those with whom said counsel alleged the Trust Company had co-operated in respect to its actions as Trustee under said Mortgage and under said Contract B. No protest was made by said Judge, or his counsel, against this proceeding upon the part of said Savings Union, but counsel for said Judge, not only by so relying upon the existence of said application, but also by endeavoring in argument, as elsewhere stated herein to create the impression that said complaint in intervention and the charges of fraud made therein were justified, and by insinuating that said Judge might have acted as he did because he had inferred upon his own account the truth of the frauds so charged, by implication and innuendo supported such charges of fraud, and in effect said action of said Savings Union. Wherefore, I am led to believe, and do believe, and so

charge, that said Judge has a personal bias and prejudice in favor of said Savings Union.

XVII.

"This affidavit was not filed ten days before the beginning of the pending term of court of said United States District Court, for the Northern District of California, to wit, prior to March 6, 1916, for the following reasons:

"The plaintiff is a New York corporation, having its principal offices in the city of New York, where I reside, and having no branch offices or representatives in the city and county of San Francisco, or in the portion of the United States west of the city of New York; that none of the facts and things herein stated, other than the general course of the proceedings in said cause, the appointment of said Frank G. Drum as one of said Receivers, the appointment of said John S. Partridge as attorney for the said Receivers, and the rendition of the opinion of said Judge on February 21, 1916, and the fact that said Judge and counsel for said Receivers had apparently taken umbrage to some extent, on account of the prosecution of said New York suit without said Judge's permission, were known to the Trust Company, or any of its officers or agents until after March 6, 1916; that, as I am informed by counsel for theTrust Company, Jared How, Esq., one of said counsel, resident in San Francisco, was familiar prior to March 6, 1916; with the matters above stated which had occurred prior to said day. He, nevertheless, believed, as he has informed me, that in spite thereof said Judge could not and would not refuse to enter a

proper decree in this cause whenever the same should be ready for decree, or if all of the parties thereto should stipulate for the entry of such decree, and that despite the fact that there was contained in the opinion of said Judge rendered on the 21st day of February, 1916, an intimation that he considered it necessary that the obligations of the Denver Company should be enforced in this cause, there was not then any clear intimation that he considered it essential that the same should be so enforced prior to the entry of decree of foreclosure and sale herein, and that said counsel believed that whenever an application for a decree, consented to by all parties to said cause, should be presented to said Judge, he would be bound to grant the same, whether or not he should determine to proceed in the cause with the prosecution of said claims against the Denver Company; and that it was not until after the refusal of said Judge to proceed to decree in said cause on March 6, 1916, that counsel for the Trust Company had any clear ground for the belief that the personal bias and prejudice of said Judge was influencing him and might continue to influence him in his conduct and decisions in said cause to the substantial and irreparable injury of the interests of the bondholders of the Railway Company and of the Trust Company as their Trustee; and it was not until after the complaint in intervention of the Savings Union had been filed in the District Court, and the charges of fraud and bad faith therein contained had been put forward in argument before the United States Circuit Court of Appeals on the 16th and 17th days of

March, 1916, and had been acquiesced in, and apparently approved by counsel for said Hon. William C. Van Fleet (said counsel then and there collaborating with counsel for the proposed intervenor), as justifying the action taken by said Judge before any such charges were made, that any director, officer or agent of, or counsel for, the Trust Company became fully convinced that said Hon. William C. Van Fleet had a personal bias and prejudice against the complainant herein, which would cause him to persist in denying to the complainant the relief to which he is entitled in said cause and so seriously influence him therein as to make it the duty of the Trust Company to cause an affidavit of prejudice to be filed herein. Shortly after receiving information of the action of said Judge on said 6th day of March, 1916, from its counsel in San Francisco and forthwith upon receiving information that said Savings Union had on March 13, 1916, applied for leave to intervene in said cause and file herein its said complaint in intervention and of the character of said complaint and that the apparent purpose thereof and of said Judge was to postpone indefinitely the entry herein of a decree of foreclosure and sale and being requested so to do by the President and New York counsel of the Trust Company, on March 14, 1916, I left the city of New York and went directly to the city of San Francisco, arriving therein on the 18th day of March, 1916. I forthwith proceeded to interview various persons, and particularly the counsel for the Trust Company present in San Francisco, and the counsel for the Reorganization Committee present in said city, and

to examine the various papers and documents in this cause herein referred to, and by such inquiry and investigation familiarized myself with the facts and circumstances hereinabove set forth. As a result of such inquiries and investigation, I became satisfied that such personal bias and prejudice on the part of said Judge does exist and that it would be impossible by reason of the same for the complainant herein to obtain a fair consideration for and reasonably prompt enforcement of its rights and the rights of all said bondholders while said Judge should remain in control of said cause or the administration of said receivership herein and that it was necessary and the duty of the Trust Company to cause this affidavit to be filed herein. Nevertheless, I was advised by counsel for the Trust Company that, inasmuch as said applications for writs of prohibition and *mandamus* had been submitted to said Circuit Court of Appeals and at least the question of the power of said Judge to compel the litigation of said claims of said bondholders against the Denver Company and to postpone the entry of a decree herein until the conclusion of such litigation had been submitted thereupon to said Circuit Court of Appeals, it would not be proper to file this or any such affidavit, until after the decision thereon of said Circuit Court of Appeals should be rendered unless it should be necessary so to do in order to prevent said Judge from enacting in the meantime with respect to some one or more of said controverted matters hereinabove mentioned. On March 20, 1916, said Judge announced that he would not act in such matters until the decision of said Circuit Court of Appeals should be ren-

dered and thereupon I returned to the city of New York and reported the facts stated in this affidavit, and the other facts and opinions which I had gotten concerning the attitude and conduct of said Judge to the President and Executive Committee of the Trust Company. Thereafter and at the first meeting of said Executive Committee held after my return, to wit, on March 29, 1916, the Executive Committee considered my said report and also a resolution which on March 20th, 1916, had been adopted by said Reorganization Committee requesting the Trust Company so to do and thereupon adopted a resolution authorizing the execution of an affidavit of bias and prejudice in such form as should be approved by counsel for the Trust Company under my supervision, and requesting me to verify the same and cause the same to be filed not only as my individual act but upon behalf of the Trust Company and therein to insist that said Judge shall proceed no further in this said cause and otherwise as hereinbelow prayed. Accordingly I have, at this my earliest opportunity thereafter, verified this affidavit, which has been so approved by said counsel.

WHEREFORE, I individually, and on behalf and as the authorized officer of said complainant, the Equitable Trust Company of New York, do now and hereby pray and insist that said Judge, the Hon. William C. Van Fleet, shall proceed no further in this said cause, or in any matter arising therein, and that another Judge shall be designated therefor, in the manner by law prescribed, and that said Judge shall cause the fact of this affidavit and

application to be entered on the records of the Court, and also an order that an authenticated copy hereof shall be forthwith certified to the Senior Circuit Judge for the Ninth Circuit, then present in said Circuit; and for such further proceedings as are prescribed by law.

LYMAN RHOADES.

Subscribed and sworn to before me this 29th day of March, 1916.

[Notarial Seal]. MYLES M. BURKE,
Notary Public, New York County, No. 222, Register's Office No. 6148.
Term expires March 30, 1916.

I HEREBY CERTIFY that I am the counsel of record of the complainant in the above-entitled cause, The Equitable Trust Company of New York, as Trustee, and that I reside in the city of San Francisco, and am a member of the bar of the United States District Court, for the Northern District of California, and that I am familiar with the proceedings in said cause, and have read the affidavit of Lyman Rhoades, to which this certificate is appended, and that such affidavit and application are made in good faith.

JARED HOW,
Counsel of Record for said complainant, the Equitable Trust Company of New York."

Now, I suggest again to the Court the procedure under sections 21 and 20 of the Judicial Code, and I submit a form of an order certifying the fact of the filing of this affidavit and application.

The COURT.—Is it your view that *ipso facto* the

filing of this affidavit, without regard to the truth of the matters stated, disqualification ensues?

Mr. HOW.—I do think there can be no doubt as to the meaning of the Statute upon that, your Honor.

The COURT.—It has been construed by the Federal Courts otherwise.

Mr. HOW.—It has?

The COURT.—Yes. I think you will find in a note to the Judicial Code that the facts must be such as in their nature tend to show disqualification; but, Mr. How, very clearly I don't suppose that anyone would say that where an affidavit assails the Judge in a respect in which he is utterly unconscious of being at fault, and especially where it assails him with reference to personal matters dragged in for the purpose of embarrassing him in the administration of the case apparently he would be expected to sit silent and not answer the affidavit. I certainly have a right to place myself right before the public.

Mr. HOW.—I should assume, your Honor, that the right to answer the affidavit must be conceded but I should assume that the matter of the determination of the fact of disqualification would rest with the Circuit Judge— perhaps the Senior Circuit Judge.

The COURT.—I doubt that. I think it would have to rest with the Circuit Court of Appeals.

Mr. HOW.—The case of Henry v. Spear, 201 Fed. 869, is the only case I know of under this section of the statute.

The COURT.—You will find two or three cited in the note to those sections in the Judicial Code.

Mr. HOW.—The amendment I think is the amendment of 1913 as the code now stands, but for your Honor's assistance, and as this is very short, I will read the paragraph upon this point:

> "Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the Judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification."

Mr. PARTRIDGE.—Where is that, Mr. How?

Mr. HOW.— 201 Federal 869.

The COURT.—I think, Mr. How, I certainly would be inclined to have the judgment of my own Circuit Court of Appeals upon the subject after a proper answer made to the matters which it is claimed tend to show prejudice.

Mr. HOW.—Your Honor, I have no further duty to perform and cannot be of any more assistance to the Court.

Mr. MADISON.—If your Honor please, the Savings Union Bank & Trust Company has up this morning an amended petition for leave to intervene here for the purpose of being made a party to the

record for the purpose of introducing evidence in order to aid the Court in arriving at an up-set price. As I understand it, the only point now before this Court at the present time, assuming that the Circuit Court of Appeals' opinion is final will be the signing of a decree and fixing an up-set price. The plaintiff in the case admits that there should be an up-set price fixed, and the affidavit so recites. All the parties to the case agree that there should be an up-set price—

Mr. HOW.—Don't claim that I am bound by any such statement as that. I don't admit it. I don't think it is a proper case for an up-set price, never have and shall not to the end. I think the Court has the power to fix an up-set price.

Mr. MADISON.—The proposed decree drawn up by Mr. How and submitted by Mr. How on behalf of the Equitable Trust Company contains a provision providing for an up-set price and simply leaving a blank for the amount to be filled in. Am I correct about that, Mr. How?

Mr. HOW.—Quite correct.

Mr. MADISON.—And at the time this matter was presented Mr. How said he thought it was a proper case for an up-set price. He had nothing to say however upon that point.

I think this is a case where an up-set price should be fixed and I would be glad to argue that point at the proper time. There is no objection, as I can see, to the form of the decree and nothing before the Court but the fixing of the up-set price.

This affidavit seems to me to be the most remark-

able that I, in my experience, have listened to. It states that it is the duty and it is the purpose of the Reorganization Committee to get the lowest possible price, to have this property sold for the lowest possible price, that it is in its interest to do so and it intends to do so—

Mr. HOW.—Mr. Madison, may I interrupt you a moment?

Mr. MADISON.—Yes.

Mr. HOW.—Your Honor, I feel it is my duty, not knowing just what counsel for this applicant is proceeding to, it is my duty to protest against this Court hearing any further proceedings of any character in this court.

The COURT.—Enter the protest of record, proceed, Mr. Madison.

Mr. MADISON.—The affidavit recites that it is the purpose, the desire and the intention of the Reorganization Committee to have this property sold at the lowest possible price; on the other hand, that it is in the interest and the desire of the dissenting bondholders who have not joined this Reorganization Committee to have it sold at the highest possible price. Therefore there is an irreconcilable conflict between the hondholders who have joined in this Reorganization Plan and those who have not. He says it is the duty of the Equitable Trust Company, which makes this affidavit, to stand aloof and that it is doing so and intends to do so. And yet in this case, if your Honor please, the record shows that the President of the Equitable Trust Company is the Chairman of the Reorganization

Committee; and the record in this case shows, if your Honor please, that the Vice-president of the Equitable Trust Company, the man who swears to this affidavit, is acting as the Secretary of the Reorganization Committee. Now, is there any question that if the President and the Vice-president of the Trust Company are acting as the Chairman and the Secretary of the Reorganization Committee, that they are acting together?

Now, as I say, we have before the Court an application for leave to intervene for the purpose of being made a party to the record in order that we may introduce proper evidence, that we may subpoena witnesses that we may be heard upon matters relating to the fixing of this up-set price.

The Trust Company has filed an answer here, in which it alleges that it intends to and will act in accordance with the wishes of the majority.

So the minority have nobody representing them before the Court.

I have a number of cases here and I would like to argue the question to the Court with respect to mortgage foreclosures of railroads but the only question I have in mind is whether the Court should act upon that matter while this other matter is pending.

The COURT.—The opinion of the Circuit Court of Appeals, as I read it in a more or less cursory way because I have not had a copy furnished me, contemplates that the minority bondholders may be heard on the question of an up-set price; they may appear here and introduce evidence as to value, and so forth. Does that render it necessary for that

purpose that they be allowed to intervene?

Mr. MADISON.—Yes, sir. I have authorities on that point. Not only that they have the right to intervene, if your Honor please, but that it is prejudicial error to refuse to make them parties to the record. I have cases under just such like circumstances.

The COURT.—It seems to me, Mr. Madison, it would not be proper for the Court to proceed at this time and make any order in the face of this affidavit challenging its authority to sit here by reason of bias and prejudice. I think the first thing should be that the Judge of the Court be given an opportunity to answer that affidavit.

Mr. MADISON.—I submit then that both matters stand over together.

The COURT.—Because I do not accede at all to the proposition that *ipso facto* upon the filing of such an affidavit the Court is absolutely powerless to protect itself against aspersion cast in as formal and solemn a way as by a written affidavit such as this: and certainly it does seem to me that if the Court were to permit itself to be driven from what it conceives to be its duty by such an attack without any response it would certainly be subject to the characterization of being cowardly; I don't think anybody has ever accused me of being that in the performance of my duty. I certainly shall undertake to answer any and all matters which are advanced here to refute the existence of a prejudice which I absolutely am unconscious of. Now, we are not always conscious of the workings of our own mental processes.

Sometimes we are actuated by things that we are not actually mentally conscious of; but certainly I am not aware of the existence upon my part of the slightest degree of feeling or prejudice which would preclude me from doing equal and exact justice between these parties. And I doubt seriously if counsel—any of the counsel engaged in this case that have taken views opposite to those expressed by this Court would willingly stand up and personally intimate that they believed the Court was actuated by prejudice. Very clearly it seems to me the mere action of the Court in passing upon the matters before it reaching a conclusion at variance with the views of counsel is not of a character upon which to predicate prejudice—I mean in and of themselves. I certainly expect to fully answer this affidavit and show, if I may, the absolute and entire absence of any sentiment, feeling or actuating motive that could in any wise be characterized as prejudice in this case. What this Court has done it has done with the single and the sole purpose of trying to perform its duty in such a way under the conception that that was its duty as to conserve the rights of everybody concerned in this property which has been submitted to its charge, and to so do it that no man could go forth to the world and say that his rights however insignificant as compared with those holding greater had not been fully protected by this Court. That has been the motive and the purpose of this Court. It does not propose to be driven from the execution of those duties which fall to it by reason of the place it holds unless it is found that the mere filing of

this affidavit without determining the question of whether or not it is sufficient in substance to disclose prejudice such as to preclude this Court from acting is of that fiat character as to disarm this Court of jurisdiction *ipso facto.*

Mr. MADISON.—I don't take it, if your Honor please, that anyone can have any doubt about those matters, or about your Honor's desire always in connection with this matter to protect the bondholders as a whole and not to act simply because a Reorganization Committee has requested action.

The COURT.—That affidavit purports to have been sworn to in New York but it has facts recited in it which must necessarily have been put into it here.

Mr. MADISON.—My point at the present time is simply that my application for leave to intervene may keep along with this other matter.

The COURT.—Oh, yes. I will put the matters over, including—do you want to be heard, Mr. Partridge?

Mr. PARTRIDGE.—Yes, if your Honor please, solely on the question of the method of procedure. Section 21 of the Judicial Code provides that not only must the party state the bias and prejudice of the Judge but he must set out the facts and the reasons for the belief that such bias or prejudice exists. This matter has just come up this morning. As usual these gentlemen did not even do me the courtesy of serving me with a copy or letting me know that the thing was going to break in this outrageous way; but as I understand the statute—

The COURT.—I can suggest to you that counsel sent it to my chambers for my private perusal but I refused to have it left there and directed that it be presented in open court.

Mr. HOW.—I received it only this morning and had no copy.

Mr. PARTRIDGE.—Well, Mr. How, it is not the first time—as long as we are on the subject. At any rate, it seems to me—without examining into it at all, it does seem that the filing of the affidavit will divest the Court of any jurisdiction to proceed any further until the questions involved in the affidavit are determined.

The COURT.—I should imagine that must be so.

Mr. PARTRIDGE.—Yes. However, this case cited by Mr. How points out conclusively that then the duty devolves upon the Judge of the court to determine from the terms of the affidavit itself whether or not the matters therein set forth are such as to constitute a personal bias and prejudice; and therefore if the Court finds that it is legally sufficient to constitute in his mind a bias and a personal bias against the complaining party the court then has nothing to do but to pass the matter up to the presiding Judge. Therefore it is clear even from that very meagre and skeleton diffusion that it is your Honor's duty to examine this affidavit and determine whether or not, taking it all to be true—and of course most of it is untrue, but taking it all to be true, whether or not it would constitute matters which would bias your Honor against the plaintiff or the complainant in this case.

Now, if your Honor please, as I understand it, the affidavit when you boil it all down and strip it of those portions of it which are venomous and stripping it of those portions of it which are manifestly on the face of the record untrue it comes down to this, that the evidence of bias and prejudice in your Honor's mind consists in the simple fact that you have endeavored to do your duty by construing the law and Contract B, as you found it. Now then, I may be wrong about that; as I say, I have just heard of this since I came into court this morning; but if that be so, then your Honor will determine that that affidavit does not constitute it a cause to send it to the presiding Judge under the statute. If you find that those matters are such that in their nature they might be construed to be prejudice in your Honor's mind then it would seem to me the question of meeting the outrageous allegations of that document are matters that should go to the presiding Judge. I therefore would suggest, if I may do so without again inviting a charge of undue zeal, that your Honor shall suspend all matters in consideration of this cause until you have examined that affidavit.

The COURT.—Well, that is the course I was about to suggest when you arose. I deem the filing of the affidavit sufficient to suspend the action of the court on the merits of any matter before it until it has had an opportunity to pass upon the sufficiency of that affidavit. When I have done so, should I conclude that it is unanswerable as tending to show bias and prejudice upon the part of this Court,

then of course the matter will be certified to the presiding Judge; if I deem that it is not of that character but such that it is not in its nature one to give rise to legal bias or prejudice—because that is what the statute deals with—then I shall certify the question to the presiding Judge to pass upon whether or not—is that the method to be followed, to the presiding Judge or to the Court?

Mr. HOW.—The Senior Circuit Judge now in the Circuit.

The COURT.—I imagine, Mr. How, that means an instance where the affidavit is found to be sufficient in substance to amount to a showing under the statute, and it would be only for the Circuit Judge a direction to some other Judge to take the matter up; isn't that right?

Mr. HOW.—The only decision that I know of is the one I read to your Honor. They speak there of its legal sufficiency but then the question whether a disqualification exists under the facts they say is not a matter for the Judge to determine.

The COURT.—I will let these pending matters stand over until say Wednesday morning and in the meantime I will advise myself as to the proper method and manner in which to answer the matters that have been set up in this affidavit.

(The further hearing of the matter was thereupon continued until Wednesday, April 5, 1916, at 10 A. M.)

Exhibit III [to Petition for Mandamus—Proceedings Had April 5, 1916, Re Motion to Disqualify, etc.].

In the District Court of the United States, for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. W. C. VAN FLEET, Judge.

THE EQUITABLE TRUST CO. OF NEW YORK

vs.

WESTERN PACIFIC RAILWAYCOMPANY et al.

Wednesday, April 5, 1916.

REPORTER'S TRANSCRIPT.

Index.

Direct Cross Re D Re-X.

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

Before Hon. WM. C. VAN FLEET, Judge.

THE EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY et al.,

Defendants.

Wednesday, April 5th, 1916.

Counsel Appearing:

For the Equitable Trust Co. of New York, Trustee: JARED HOW, Esq.

For the Central Trust Co.: T. A. THACHER, Esq.

For the Boca & Loyalton Railroad: Messrs. SLACK & GOODRICH.

For the Savings Union Bank & Trust Company: Messrs. PILLSBURY, MADISON & SUTRO.

For the Reorganization Committee: JOHN F. BOWIE, Esq.

For the Receivers: JOHN S. PARTRIDGE, Esq., GARRETT W. McENERNEY, Esq.

Mr. McENERNEY.—In the application filed here on Monday, if your Honor please, under section 21 of the Judicial Code, your Honor has requested Mr. Partridge and me to appear here and lay before you such considerations respecting the law and facts as occur to us; as we were not able to get a copy of the affidavit until yesterday, and as I was not able to see it until this morning, we ask that the matter stand over until Friday, and as I am not able to be here in the forenoon, we ask that the hour be fixed for two P. M.

The COURT.—Have you any objection? (Addressing Mr. How.)

Mr. HOW.—I feel compelled to object to any continuation of the matter, and to urge upon your Honor's attention what I consider to be the proper and sole practice under the statute made to cover

such cases as this. I do not know what manner of presentation counsel are prepared to make or desire to make, but if it is true that the affidavit filed with your Honor is in legal form, an affidavit and sets forth the matters prescribed in section 21 of the Judicial Code, I protest that the plain and right meaning and only meaning of the statute is that your Honor is foreclosed from further proceeding with the case, and that further proceeding means not only such proceedings as are appurtenant to the relief prayed in the bill of complaint but proceeding upon this application, because this application is made in the cause and is in the proceedings in the case; and I therefore request that the Court, in obedience to the statute, will cause to be entered of record the fact the affidavit has been filed, and will cause it to be certified with the application forthwith to the Senior Circuit Judge now in this Circuit for proceedings as provided by the Judicial Code.

Mr. McENERNEY.—If your Honor please, I do not desire to enter into any discussion of this matter, first, because what I might say might be imputed to your Honor, and it would be a cruel visitation if your Honor should be held responsible for all that I think, or, indeed, for all that I say. For instance, there is a great portion of this affidavit devoted to statements of fact as to why the terms of the statute were not complied with, and I desire to ascertain whether these gentlemen can prosecute a proceeding in the Circuit Court of Appeals up to and including the 28th of March, 1916, to compel your Honor to proceed with this case, and on the 29th day

of March file an affidavit of bias and prejudice predicated upon facts, all of which existed before the 28th day of March. That is one of the things I desire to give my attention to, and will ask for the two days.

Mr. PARTRIDGE.—If your Honor please, may I suggest to your Honor that it seems to be thoroughly established by the case of Henry v. Spear, which is cited with approval by the United States Supreme Court in the Steel Barrel Company case in the 230 United States—at least, this much is established—that the Court must determine for itself whether or not the affidavit as filed is sufficient to come within the terms of section 21. Now, then, the counsel whom your Honor has requested to represent you ought, at least, to have time to advise themselves as to whether or not the affidavit does come within the terms of those two decisions; aside from everything else, it seems to me that we ought to have time to examine it in that regard. As I stated to your Honor on Monday, we were served with no copy whatsoever of this affidavit, never saw it until we came into court.

The COURT.—I do not suppose they were compelled to do that.

Mr. PARTRIDGE.—Perhaps not; at any rate, we were not able to get even a copy of it until yesterday. It is very long; and it discusses a great many matters which are involved not only in the facts, but in the law. I think we ought to have time enough to make an attempt at least to properly inform your Honor as to what the law is.

The COURT.—There is no question in my mind, from Mr. How's interpretation of the statute, that that duty rests upon the Court to determine, primarily, and before taking any action, as to the legal sufficiency of this affidavit; that the statute expressly provides; and, feeling as I do, unconscious of any bias or prejudice existing at the time this affidavit was filed, I appreciate that it being a personal assault upon the Court, upon the Judge, as to his state of mind, it is not a question which the Judge should undertake to himself determine, without legal advice. It was for that reason that I requested Mr. McEnerney and Mr. Partridge, representing me personally, to give me their judgment. Of course, eventually, I shall be called upon to determine that fact, and if I determine, either upon my own judgment or the advice of my counsel, with which my judgment may concur, that this affidavit is of legal sufficiency to give rise to prejudice such as the statute contemplates, then I shall proceed to certify the fact to the Senior Circuit Judge. If, on the other hand, I determine that it is not legally sufficient, then it is equally my duty, my imperative duty, to ignore the affidavit and refuse to enter any such record as would be required if I were called upon by reason of the character of the affidavit to certify it to the Circuit Judge. That, of course, counsel admits by his own suggestion rests upon this Court as a duty; and that is the question that I feel, inasmuch as we cannot in matters that pertain to us personally exercise the same absolutely

free and untrammeled judgment as we can with matters affecting others, that I am entitled to the advice of counsel. And while, under the circumstances, as I suggested, as a legal proposition, the attorneys for the receivers were not entitled to have a copy of this affidavit served upon them, and have had to take their own means of procuring one, I think that the request they make is but a reasonable one, and I shall grant it.

Mr. HOW.—May I say a word, your Honor?

The COURT.—Certainly.

Mr. HOW.—I do not want to be understood as making any concession that the Court has power to pass upon the sufficiency of this affidavit, excepting as to legal form.

The COURT.—You do not need to; the statute prescribes that.

Mr. HOW.—But I did not know, from what your Honor said, but what you may have misunderstood me.

The COURT.—No, I understood you perfectly; but at least that question is involved, and it casts the imperative duty upon this Court to pass upon that question, and that is the very question which I feel I am entitled to have the advice of counsel on, and with that view, the matter may go over until Friday, at two o'clock, but I trust that counsel will be ready at that time to give me such advice as will enable me to see my way clear. I have not the least disposition in the world to delay this matter. My disposition is to have it disposed of, because I think

it will readily be appreciated that the situation is not a pleasant one, nor one that anyone would have the disposition to prolong; but to the extent of enabling me to perform a duty which the statute casts upon me, I feel that the request is but a reasonable one, to enable counsel to advisedly give me such aid as may lie in their power. Let the matter go over until two o'clock on Friday.

Mr. PARTRIDGE.—Will your Honor make an order, also, that some 20 or 30 of the routine matters of the railroad that are on this morning and were postponed on account of the suspension produced by the affidavit, directing that they go over until the same time?

The COURT.—I think that those formal matters had best go over until a week from Monday. I may not be able to be here Monday, because the Sacramento term opens Monday, and I will have to be there, but I will make it a point to be here the following Monday.

Mr. PARTRIDGE.—Will your Honor then postpone all these matters until then?

The COURT.—Until Monday, the 17th.

Mr. MADISON.—Will your Honor postpone the petition for leave to intervene of the Savings Union until Friday at two o'clock?

The COURT.—That matter may go over until then. If I should conclude, within the limits of the statute, as is provided, that this affidavit is not a disqualifying affidavit, then I shall give counsel an opportunity to proceed with any matters that they

desire to submit as speedily as lies within their power and that of the Court, and they will find that there will be no disposition to delay any of these proceedings to anybody's injury.

(An adjournment was here taken until Friday, April 7, 1916, at two P. M.)

Exhibit IV [to Petition for Mandamus—Affidavit of William C. Van Fleet].

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY, BOCA & LOYALTON RAILROAD COMPANY, and C. L. HOVEY, Its Receiver, and MERCANTILE TRUST COMPANY OF SAN FRANCISCO,

Defendants.

CENTRAL TRUST COMPANY OF NEW YORK,

Intervenor.

AFFIDAVIT OF WM. C. VAN FLEET.

United States of America,
Northern District of California,
State of California,
City and County of San Francisco,—ss.

WM. C. VAN FLEET, being first duly sworn, deposes and says:

That he is a duly appointed, acting and qualified District Judge of the United States District Court for the Northern District of California, and the Judge presiding in the above-entitled matter.

That affiant has no personal bias or prejudice of any kind or character whatsoever against The Equitable Trust Company of New York, plaintiff in the above-entitled cause, and has no personal or other bias or prejudice against The Equitable Trust Company of New York as Trustee and as plaintiff in said cause.

That affiant has no personal bias or prejudice in favor of either Frank G. Drum or Warren Olney, Jr., as Receivers of the Western Pacific Railway Company appointed in said action, or their counsel John S. Partridge.

That affiant does not know the said Equitable Trust Company of New York, nor any person connected therewith except its solicitor in this cause, and that while affiant was ill at home Mr. Alvin W. Krech, President of The Equitable Trust Company of New York, called upon affiant, and that affiant has no occasion for any bias or prejudice because affiant, as Judge of said court, has always assumed,

and still does assume, that the said Trustee does and will represent all of the First Mortgage Bondholders and not any particular class thereof and will do its full duty in the premises.

That affiant has no personal or other bias or prejudice in favor of the Savings Union Bank and Trust Company, and has never, at any time, had any business with it, or connected with the said Savings Union Bank and Trust Company, and has not even any acquaintance with any of its officers except that affiant knows in a casual and social way John S. Drum, the President thereof, and that affiant did not even know that said Savings Union Bank and Trust Company was the owner of any of the Western Pacific bonds until the 6th day of March, 1916, when petition for leave to intervene was presented by its counsel.

That in respect of the controversies mentioned in Paragraph III of the affidavit of Lyman Rhoades filed herein, affiant says that the proceeding to enjoin the plaintiff from prosecuting a certain suit by it commenced in the United States District Court for the Southern District of New York against the Denver and Rio Grande Railroad Company and others, is not being prosecuted by said Receivers and their counsel at the instance of this affiant, or being prosecuted by said Receivers and their counsel at all, in this: that the order of this court, in that regard, has been reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and that in so far as said affiant is concerned, and said Re-

ceivers and their counsel, the said judgment of said United States Circuit Court of Appeals is final, and will be observed in every particular.

That in so far as the application by the Trust Company as complainant herein for a decree of foreclosure and sale of the property of the Railway Company is concerned, it is not true that said application is opposed by said Receivers and their said counsel, in this: That prior to the filing of the affidavit of bias and prejudice herein, this affiant, as Judge of said court, had determined to proceed forthwith with the hearing and trial of said cause for the purpose of entering a speedy decree of foreclosure and sale. That it was the intention of this Court on the day when said affidavit was filed, to grant the motion of said plaintiff for and set said cause for hearing for Thursday, the 6th day of April, 1916, for a hearing first, upon the question as to whether there should be an up-set price, and, second, if this court should determine that there should be an up-set price, then what the amount thereof should be, and to give all parties an opportunty to be heard in accordance with the opinion of the said Circuit Court of Appeals.

And in this behalf affiant alleges: That prior to the 6th day of March, 1916, that there had never been any application whatsoever to this court, or the Judge thereof, to set the said cause for trial, or to enter a decree therein.

That on the 6th day of March, 1916, this Court had made and entered its order directing that the Den-

ver and Rio Grande Railroad Company and the Missouri Pacific Railway Company should be made parties to this action, and had further made its order directing that thirty days' time be granted to the Receivers herein to report to this Court for action on contracts and relations with the said Denver and Rio Grande Railroad Company, and that the time limited for the said Denver and Rio Grande Railroad Company and the Missouri Pacific Railway Company to appear, and the said Receivers to report said contracts and relations, had not then expired.

That on the said 6th day of March, 1916, without any previous notice to this Court, the Solicitor for said plaintiff submitted to the Court the form of a decree, together with the stipulations mentioned in the affidavit of Lyman Rhoades.

That the said matters were presented to the Court at the opening of said court on the said 6th day of March, 1916, and it appearing that no notice thereof had been given to the Receivers, or their counsel, said Court continued the matter until 2 P. M. of said day. That at 2 P. M. of said day certain proceedings were had. That affiant refers to the stenographic report of said proceedings, and hereby incorporates the same herein.

That there has never been any opposition by the Receivers, or their counsel, to a setting of said cause or the entry of a decree therein, unless it be in the desire of said Court to have the advice of the Receivers and their counsel.

That in so far as the proceeding to bring the said

Denver and Rio Grande Railroad Company into this cause as a party defendant and to determine in said cause its liability under Contract B, is concerned, it is not true that said proceeding is being conducted by the Receivers or their counsel by the direction of this Court, or otherwise, or at all, in this: That prior to the filing of the affidavit of Lyman Rhoades herein, the said United States Circuit Court of Appeals for the Ninth Circuit had directed that a Writ of Prohibition be issued prohibiting this Court from further proceeding in the matter of its order bringing in the said Denver Company; and in this: That this Court and said Receivers and their counsel, have and do accept the said opinion of the said Honorable Circuit Court of Appeals as final in said last-mentioned matter, and neither this affiant, nor said Receivers, nor their said counsel, intend to, nor will, proceed any further therein.

That in respect of the application of the Savings Union Bank and Trust Company to be permitted to intervene in said cause in order that it may participate in the prosecution thereof, particularly of the said claim against the Denver Company, it is not true that at the time of the filing of the said affidavit there was any such application, in this: That prior to the time of the filing of the said affidavit, the said Savings Union Bank and Trust Company had withdrawn said portion of its said petition and amended the same so that its petition at the time the said affidavit was filed asked to be allowed to intervene only for the purpose of being heard upon the question of the up-set price.

And furthermore, that no petition of the Savings Union Bank and Trust Company has been granted, nor is the Savings Union Bank and Trust Company a party to the said cause.

It is not true that this affiant, as Judge of said court, identifies the Trust Company with the Reorganization Committee, and does not and never has regarded the Trust Company as in reality not acting for the bondholders who have not joined in said plan and as the representative solely of the bondholders who have joined therein, but has always assumed that said Trust Company, in accordance with its duty would at all times act impartially for the best interests of all the bondholders.

That it is absolutely untrue that in making the said statements on the 6th day of March, 1916, or any of them, this affiant cleary implied, or implied at all, that the Trustee was acting only in the interests of the bondholders who had joined in the plan of Reorganization and was not caring for all of the bondholders.

That affiant does not know what counsel for the respondents may have intimated on March 16th and 17th in the Circuit Court of Appeals, but that affiant has never intimated, nor meant to intimate, and never held any opinion that the Trustee could not be trusted to act fairly and impartially in protecting the interests of the minority bondholders as well as the interests of the majority bondholders.

That it is not true that upon the institution of the suit mentioned in said affidavit in the Southern

District of New York, this affiant, as Judge of this court, or otherwise, displayed any resentment at the Trust Company's action in commencing the same without his permission, but that on the other hand, on the hearing in open court this affiant, as Judge, stated in unequivocal terms that he had no doubt whatsoever that the said Trust Company and its counsel were acting in good faith in bringing said suit in said Southern District of New York, and that he had no feeling whatsoever in the matter arising from the fact that the District Court in California was not applied to for permission or notification given to it or affiant as such Judge. That his sole idea in enjoining said suit was his conviction, after extensive argument and investigation, that it was his duty so to do.

That affiant hereby refers to the stenographic report of all of the proceedings upon the petition of the Receivers for instructions as to whether or not said Receivers should begin suit on Contract B, and also of the proceedings upon the order to show cause, and hereby incorporated the same herein, as indicating the purpose and motive of affiant in making said order.

That it is true that counsel for the Receivers in the matter of said appeal from said order enjoining the said Trust Company maintained that said order was not an injunction within the meaning of the Judcial Code and that said counsel based their contention in that regard upon the decision of the Supreme Court of the United States in Ex Parte Tyler, 149 U. S. 164.

That it is not true that affiant has ever clearly or at all intimated, or was ever ready to believe, that the Trust Company instituted the said New York suit for the purpose of evading the jurisdiction of this court, or ever intimated or was ever ready to believe that the Trust Company or the majority bondholders were unwilling to confide their interests under said contract to the decision of this affiant as Judge of said court.

It is not true in any sense that this affiant, as such Judge, or otherwise, suspects or resents the conduct of the Trust Company in instituting the said New York suit, but on the contrary affiant assumes that the opinion of the Court of Appeals is correct.

That it is not true that affiant, as said Judge, or otherwise, has constituted himself a special guardian and champion of the minority bondholders, but, on the contrary, this affiant, as is his duty under the law, has at all times endeavored to act, and will continue to act for the interests of all of the bondholders and has on numerous occasions during the progress of the proceedings in open court so announced.

That it is true that the members of affiant's family had small amounts of the said Western Pacific First Mortgage Bonds but that all thereof were sold prior to the 2d day of March, 1915, when the bill to foreclose in this matter was filed in this court.

It is true that a sister-in-law of affiant had three of said bonds at the time that the said suit was commenced, but affiant has not even inquired as to

whether or not his said sister-in-law has joined the said Reorganization Committee and that by no possibility could the ownership of the said bonds by affiant's sister-in-law in any wise or manner whatsoever have any effect on the mind or judgment of affiant as Judge of said court, or otherwise, in connection with any matter involved in said action. And in this behalf, affiant alleges that during a discussion between Court and counsel on the 29th day of June, 1915, with reference to said bonds, and during the argument upon the order to show cause, affiant stated from the bench in open court, that he had once owned five of said bonds and had sold two shortly after their purchase in 1910, and had given the other three to his wife, and that his said wife had sold the same prior to the commencement of this action. That prior to the commencement of this action, affiant advised his said wife to sell the said three bonds for the reason that the same would probably go to a lower price in the market, and for the further reason that affiant expected that any action to foreclose the mortgage would be brought in the court presided over by this affiant, and affiant did not desire that any member of his immediate family should own any of said securities.

That affiant has no feeling of any kind, by virtue of the fact that said bonds were sold for less than they cost.

That in regard to the bonds owned by the sister-in-law of affiant, affiant states that he has never, in any wise, advised in regard to the same, and has

nothing whatsoever to do with the business or investments of his said sister-in-law.

And affiant further says and affirms that neither the fact that affiant or members of his family have owned any of the said bonds or the fact that his said sister-in-law owned any of said bonds at the time of the commencement of this action, or may now own the same, could or does have any effect whatsoever upon the mind of this affiant, nor has this affiant ever considered or will ever consider said ownerships in any matter connected with this cause in any manner whatsoever.

That in respect of the statement of Garret W. McEnerney in argument before the United States Circuit Court of Appeals, affiant states that he did not know of said statement of Mr. McEnerney until he had any desire whatsoever that the Denver and Rio Court, and that affiant is informed by Mr. McEnerney that the same was an expression of the personal feeling of Mr. McEnerney, and that affiant has never had read the record of the argument before this Grande Railroad Company should be forced into the hands of a Receiver, but, on the contrary, on numerous occasions during the arguments in this court affiant has stated it was not his intention or desire, if the same could possibly be avoided, to take any step which would result in a Receivership for the Denver and Rio Grande Railroad Company.

That affiant never talked with the said Garret W. McEnerney prior to the said argument in said Circuit Court of Appeals, nor consulted with him in

regard to any matter connected with said cause or any of said writs.

That affiant had no idea whatsoever as to the line of argument which would be taken by the said Garret W. McEnerney, but was satisfied to leave the management of said argument to the judgment and discretion of his attorney.

That affiant consulted with said John S. Partridge with reference to the said writs of prohibition and *mandamus* and instructed the said John S. Partridge to confine himself strictly to a discussion of the legal principles involved therein, and affiant has learned from the stenographic record upon the hearing in the United States Circuit Court of Appeals that the said John S. Partridge did confine himself strictly to the legal questions involved.

That affiant hereby refers to the stenographic record of the argument before said Circuit Court of Appeals and hereby incorporates the same in full in this affidavit.

It is true that at the time of the appointment of the Receivers, affiant was requested to appoint Warren Olney, Jr., as sole Receiver.

It is not true that it was stated to affiant that the existing Legal Department of the Western Pacific Railway Company was adequate to the discharge of the legal duties incident to this Receivership, in this: That affiant as such Judge was requested to appoint Warren Olney, Jr., sole Receiver, and it was suggested that A. R. Baldwin should act as counsel for Receiver; that at said time, said Warren Olney, Jr., was one of the attorneys for the said

Western Pacific Railway Company, defendant herein, and that the said A. R. Baldwin was also one of the attorneys for the defendant herein, and as a matter of fact the said A. R. Baldwin was attorney of record in this suit for the said defendant; that affiant, as such Judge, without intending any reflection whatsoever upon either said Warren Olney, Jr., or the said A. R. Baldwin, stated to them that it would be highly improper to take the course urged upon affiant for the reason that it has always been held, by court and text writers on Receiverships that Receivers and their counsel should be indifferent between all the parties to the action; that affiant stated that he was willing to appoint the said Warren Olney, Jr., as one of such Receivers, but deemed it proper to appoint another person to act with him; that after this it was stated to affiant that the parties had agreed upon another person to be appointed with the said Warren Olney, Jr.; whereupon, affiant stated that it was not the custom of his court to have parties to an action agree for said Court and that inasmuch as the Receivers and their counsel would be officers of and representatives of the Court in the strictest sense of usage of law and equity, and inasmuch as affiant well knew that the conduct of a transcontinental railroad would and must involve questions of magnitude, administrative, financial and legal, said Court felt justified in appointing the said Frank G. Drum as coreceiver with the said Warren Olney, Jr., and John S. Partridge as their counsel.

That affiant has no connection whatsoever with the said Frank G. Drum, but knew and knows that said Frank G. Drum is a man of the highest character and integrity, as well as of wide experience and ability in connection with large affairs, and in whose judgment and ability affiant has the utmost confidence.

That it is true that affiant was at one time the law partner of George H. Mastick, the present law partner of the said John S. Partridge, but that the copartnership existing between the said affiant and the said George H. Mastick had been dissolved on the 10th day of April, 1907, and that the said John S. Partridge formed a copartnership with the said George H. Mastick on or about the 15th day of May, 1907; that said affiant was never a partner of the said John S. Partridge at any time nor in any way connected with the said John S. Partridge in business; and affiant never had any personal acquaintance with John S. Partridge until after said copartnership.

That the sole actuating motive of affiant in designating the said John S. Partridge as counsel for said Receivers was the fact that affiant had, and now has, the most complete confidence in the integrity and ability of said John S. Partridge to conduct the legal affairs of said railroad and said Receivership, and to advise this Court with reference thereto.

That it is true that the son of affiant is employed by the said firm of Mastick & Partridge, but that affiant's said son is employed by said firm upon a small salary, and that affiant's said son has no in-

terest whatsoever in the earnings of said firm, or the business thereof, and cannot profit in any possible way by the fact that the said John S. Partridge is counsel for said Receivers, and said fact had nothing to do with the appointment of the said John S. Partridge as counsel for said Receivers, nor has said fact anything whatsoever to do with any judicial or other act of affiant in connection with said cause, nor does the said fact have any influence whatsoever upon the mind of this affiant and that affiant is informed and believes and, therefore, alleges that the said John S. Partridge ever since his appointment as counsel for the said Receivers has studiously avoided the employing of affiant's said son upon any matter even remotely connected with the said Western Pacific Railway Company or said Receivers, or any matter pending in the court of this affiant.

That in connection with the allegations in the affidavit that John S. Partridge declined to waive the issuance of citation upon the appeal and stipulate that the said appeal might be heard on the 16th day of March, 1916, affiant states that the said John S. Partridge has shown to affiant a copy of a letter sent to Jared How, solicitor for the Trust Company, in the words and figures following, to wit:

"March 8, 1916.

"Mr. Jared How,
Attorney at Law,
Mills Building,
San Francisco.

Dear Sir:

I have carefully examined and considered the stipulations proposed by you. They are (1) a paper headed 'Appeal from Injunction and Order made February 21, 1916,' and this stipulation reads as follows:

> 'The undersigned hereby waives service upon them of the order allowing appeal and notice of appeal in the above-entitled cause, and hereby stipulates that said appeal may be heard on the 16th day of March, 1916, at the hour of 2 o'clock P. M. of said day or such other time as the Court of Appeals may direct.
>
> 'It is further stipulated that no bond need be filed on the appeal in the above-entitled cause, but that the appeal bond be, and the same is hereby, waived.'

and (2) a paper headed 'Appeal from Injunction and Order made February 21, 1916,' reading as follows:

> 'It is hereby stipulated and agreed by and between the appellants and appellees in the above-entitled appeal that the said appeal may be heard upon the following documents, viz.: Petition of Receivers for Time to Consider Contracts and filed May 19, 1915, a copy of which is

hereto attached, and the enumerated below copies of which are embodied in the Petition for Prohibition and are now on file in the Circuit Court of Appeals, said documents being the following:

1. Bill of Complaint.
2. Answer of Western Pacific Railway Company;
3. Order Appointing Receivers;
4. Amended Bill of Complaint;
5. Answer of Western Pacific Railway Company to amended bill of complaint;
6. Order of June 14, 1915, directing notice of hearing;
7. Dependent bill;
8. Restraining order and order to show cause;
9. Answer of Equitable Trust Company;
10. Affidavits of Krech, Cutcheon and Partridge;
11. Opinion of Court;
12. Injunction and Order.'

It is further stipulated that the record on appeal need not be printed, but that the documents incorporated in said petition for prohibition and attached hereto may be referred to and shall constitute the record on appeal.'

"In regard to the first stipulation, I do not see how it is possible, by any such paper, to inaugurate an appeal or to confer jurisdiction upon the Circuit Court of Appeals, and for that reason, and that reason alone, I beg to be excused from signing the same.

"In regard to the second stipulation, if you take an appeal in the manner prescribed by law, I shall certainly facilitate the establishing of the record in any manner that will fairly present the whole matter to the Court of Appeals, and it seems to me that the second stipulation presented will fairly do this. This, however, is of course subject to examination and verification and suggestions of any other papers which it may seem necessary or proper should constitute a part of the record.

Yours very sincerely,

JOHN S. PARTRIDGE,

Counsel for Receivers."

That in respect of the order made by affiant as Judge of this court authorizing and directing the Receivers to take any steps they might deem necessary to protect the jurisdiction of the Court, affiant states that on the day that said, order was made Warren Olney, Jr., one of the said Receivers, and John S. Partridge, counsel for said Receivers, called upon this affiant in his chambers and that the said Warren Olney, Jr., stated to affiant that he wanted the direct authority of this Court in the matter of any proceedings that might be taken on said appeal; that affiant thereupon stated that he did not think any such order was necessary, but that it was the duty of the Receivers to take such steps in the matter as might be necessary inasmuch as there were no other persons who could or would appear in said Circuit Court of Appeals to present therein the legal considerations in support of the action of this Court; but that affiant stated to the said Warren Olney, Jr.,

that if he felt he needed the protection of such an order, there was no objection to making the same.

That it is not true that the action of counsel for the Receivers, or counsel for this affiant as respondent to said Circuit Court of Appeals, ever had any intention, nor was it the plan or other intention of this affiant as said Judge, to prevent the expression of the judgment of the said Circuit Court of Appeals upon the questions involved in either of said writs or on appeal; nor was it the intention to proceed in said cause irrespective of the propriety or impropriety of any course which affiant had intended to adopt with reference to said matters; that as a matter of fact, said affiant had not determined upon any course whatsoever which he would adopt with reference to said matters except that affiant believed that it was proper and to the best interests of the bondholders to make the Denver and Rio Grande Railroad Company a party to this action; but that in respect to the actions of the said counsel for Receivers in moving to dismiss the said appeal, affiant is informed by said counsel, and, therefore, avers, that said counsel made said motion for the reason that counsel believed the said Receivers were necessary parties to said appeal and that if they were not parties thereto, there would be no one whatsoever to oppose a reversal of the order of this Court, inasmuch as all parties to the action then appearing in effect consented to a reversal thereof; but that since the said Circuit Court of Appeals has entered its judgment reversing the same, affiant has, as in

duty bound, accepted as the law of the case the opinion of the Honorable Circuit Court of Appeals and intends to comply strictly therewith.

That it is not true that affiant is determined to compel prosecution of claims against the Denver Company before him in this cause, or otherwise, or at all, in this: that affiant regards the opinion of the said Honorable Circuit Court of Appeals as the law of the case and does not intend, and has not intended, to proceed any further in the matter of the Denver and Rio Grande Railroad Company or of Contract B; on the contrary, as hereinabove set forth, affiant was prepared, on the very day the affidavit of disqualification was filed, to proceed and set the said cause for hearing immediately, and to proceed in strict accordance with the opinion of said Honorable Circuit Court of Appeals.

It is not true that affiant entertains a deep, or any resentment whatsoever against the Denver Company; that, on the contrary, affiant does not know the Denver Company nor any person connected therewith; and it is not true that affiant believes the banking houses mentioned in said affidavit have conspired to protect the Denver Company or the holders of any of its bonds, against the claims of the Western Pacific Railway Company bondholders. In this behalf affiant alleges that he does not know said banking companies, or any of them, nor has he any opinion whatsoever in regard to them, or any action they may have taken.

That it is not true that affiant believes that the

Reorganization Committee or the Trust Company are co-operating in any manner whatsoever with said banking companies and that it is not true that affiant believes the Trust Company intends to endeavor to secure an unduly low up-set price to be fixed by the decree herein.

It is not true that said affiant has acquired or entertains a personal or other bias or prejudice against the said Trust Company on account of the matters and things set out in said affidavit, or otherwise, or at all. That the statements in said affidavit to the effect that there was no intimation during the publication of the plan of reorganization, on the part of said Judge or said Receivers, or of counsel for said Receivers that there would be any delay in the entry of a decree of foreclosure and sale, are false and untrue in their effect in this regard; that on the 18th day of May, 1915, the said Receivers filed in this court, the said Contract B, with other contracts and asked for time in which to report the same to this court for action thereon; that subsequently, the said Receivers filed in this court their petition praying for instructions as to whether or not they should begin a suit on Contract B; that upon the argument thereof, and in the briefs filed, it was strenuously insisted by the counsel for Receivers that the Denver and Rio Grande Railroad Company must be made a party to this action and that Contract B was one of the assets of the Receivership and must be enforced prior to an entry of a decree of foreclosure and sale. That said contention was made in open

court more than six months before the plan of reorganization was adopted at all and that the proceedings on the said petition and the order to show cause issued out of this court were pending in this court at the time the said plan of reorganization was adopted.

That it is not in any sense true, as intimated in said affidavit, that the opinion of this Court rendered on the 21st day of February, 1916, had anything whatsoever to do with said plan of reorganization.

It is not true as intimated in said affidavit that affiant as Judge of said court, or said Receivers, or their counsel, has ever done anything whatsoever to prevent the carrying out of said plan of reorganization, but, on the contrary, the matters which resulted in said orders set aside and reversed by the Honorable Circuit Court of Appeals, were presented to this court long before any plan of reorganization was ever adopted; that while the matters involved in said petition and leading up to the said order and opinion of this Court were argued on the 28th, 29th and 30th days of June, 1915, elaborate briefs were filed by counsel for said Trustee and the counsel for said Receivers, and the brief of the said Trustee was not filed until the 6th day of December, 1915, and that thereafter counsel for the Denver and Rio Grande Railroad Company appearing as *amicus curiae,* filed a brief in said matter and other counsel filed reply briefs thereto, so that the matter was not finally submitted to this Court until the 31st day of December, 1915, whereupon this affiant, as Judge of

said court, proceeded to examine into the said matter as diligently as the business of said court would permit and that the decision of this court on the 21st day of February, 1915, was in response to the said matter before this court and had no connection in any manner whatsoever with any attempt of any person to interfere in any way with the said plan of reorganization; that this affiant has never had any feeling of opposition whatsoever against said plan of reorganization nor any opinion regarding the same one way or another, and in that regard affiant states that he has never even read said plan, and does not know what said plan is, and has not formed any opinion thereon.

That it is not true that affiant, as such Judge, intended by the proceedings on the 6th day of March, 1916, to prevent any review of the Honorable Circuit Court of Appeals concerning the right of the parties to the entry of the decree, but that as a matter of fact on the said 6th day of March, 1916, affiant, as such Judge, postponed the hearing for the reason that a petition for the writ of prohibition had been filed, and for the reason that affiant as such Judge did not deem it proper to either grant or deny the applications without consideration, and for the further reason that affiant did not deem it proper practice to entertain an application, the avowed purpose of which was to have the same denied.

That with respect to the intimation that this affiant, as such Judge, rendered his decision of February 21st, 1915, and refused to permit the entry of said decree in the full belief that his action would

probably defeat the carrying out of said plan of reorganization, and with the desire that such might be the result, affiant states that the same is false and untrue in every particular, and affiant further states that he is not personally or at all opposed to said plan of reorganization, but the statement that he is is false and untrue in every particular, and that it is untrue that affiant is determined to defeat the same.

That it is untrue that affiant has a personal or other prejudice against the Trust Company, by reason of its co-operation with the Reorganization Committee in the endeavor to carry out said plan of reorganization, or for any other reason.

That in respect of the allegations that no general order was entered limiting the order confirming contracts to the period of receivership, affiant states that it is the opinion of affiant that there was never any occasion for such an order, but that the effect of such confirmation would only extend during the period of such receivership unless otherwise specifically stated.

That the only lease upon which there was any serious dispute was the lease of property to Dunham, Carrigan & Hayden Company upon which briefs were filed, and that as to said matter the solicitor for the plaintiff finally withdrew his opposition.

That affiant hereby refers to the stenographic report of all hearings upon all matters whatsoever in connection with the above-entitled action and said receivership, and hereby specifically makes the said stenographic record a part hereof.

That it is true that solicitor for the plaintiff

called upon affiant, in his chambers, with reference to a modification of the restraining order so as to permit the action in New York to go on against individual bondholders, but in that behalf affiant states that the said John S. Partridge, at said time, reported to affiant that only three suits for small amounts had been brought by individual bondholders and that there was no danger whatsoever of the results feared by the plaintiff, and that, as a matter of fact, no additional suits have ever been brought, although a period of ten months has elapsed and the suits which were commenced have never been brought to trial, so that the fears of the plaintiff in said regard have been proved to be entirely groundless.

Affiant further states that it is untrue that, by reason of the matters or things set forth in said affidavit and reiterated in paragraph fifteen thereof, or otherwise, or at all, he had any personal bias or prejudice in favor of said Receivers or their said counsel, or against the said Trust Company.

That it is untrue that, by reason of the matters and things set forth in paragraph sixteen of the affidavit of disqualification or otherwise, affiant has any personal or other bias or prejudice in favor of the said Savings Union Bank and Trust Company, but that, on the other hand, affiant has no feelings whatsoever in regard to said Savings Union Bank and Trust Company or John S. Drum, the president thereof, but as heretofore stated, never knew until March 6th, 1916, that said Savings Union Bank and

Trust Company had any interest in this matter; that affiant has not, will not, and cannot be in any wise whatsoever influenced by the fact that the said John S. Drum is a brother of Frank G. Drum and that neither said Savings Union Bank and Trust Company, nor said John S. Drum, is a party to this action, nor has yet been permitted to intervene herein.

Affiant, further states and avers, upon his oath that he has no feelings of bias or prejudice for or against any person party to the above-entitled cause, or for or against any bondholder creditor, stockholder, officer, agent or any other person who is or can be directly or indirectly interested in the above-entitled cause, or any subject matter or thing connected therewith.

That it is the intent of the affiant to proceed forthwith and with all possible expedition to the hearing of any further matters which may be involved in said cause, looking to the speedy entry of a decree of foreclosure and sale and winding up of the receivership.

That affiant is satisfied, in the state of his own mind that affiant in all matters and things in connection with said action can and will, and intends to do equal and exact justice to all parties who may be interested therein.

That under the decision of the Honorable Circuit Court of Appeals and the stipulations on file herein, there is no controversy left in said cause to which the said Equitable Trust Company of New York is

a party, in this: That the only question left in this cause over which there can be any controversy is the question of the up-set price, and that the said Trustee is not a party to, nor in anywise interested therein.

That on the 6th day of March, 1916, in open court, the solicitor for the said Trustee said:

> "I also ought to call your attention to the fact that there is a blank in the form of decree presented to the Court, or, rather, suggested to the Court, and covered by the motion which has been made, for the fixing of an up-set price. In that regard I do not think that I ought to refrain from saying that my conception of the duty of the Trustee is to take absolutely no part as to the up-set price which this Court may see fit to set, excepting that it holds itself liable to furnish the Court such information as it may for the aid of the Court. The only suggestion that I think the Trustee is entitled to make with any propriety is that the upset price shall not be put at such figure as will make a sale impossible, as will not produce a bidder. What that figure is, I do not know."

_____.

Subscribed and sworn to before me this —— day of

Exhibit V [to Petition for Mandamus—Affidavit of John S. Partridge].

In the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 169.

THE EQUITABLE TRUST COMPANY OF NEW YORK,

Plaintiff,

vs.

WESTERN PACIFIC RAILWAY COMPANY, BOCA & LOYALTON RAILROAD COMPANY, and C. L. HOVEY, Its Receiver, and MERCANTILE TRUST COMPANY OF SAN FRANCISCO,

Defendants,

CENTRAL TRUST COMPANY OF NEW YORK,

Intervenor.

United States of America,
State of California,
Northern District of California,
City and County of San Francisco,—ss.

John S. Partridge, being first duly sworn, deposes and says:

That he is the John S. Partridge mentioned in the affidavit of Lyman Rhoades on file herein; that immediately upon the appointment of the Receivers, on the 3d day of March, 1915, affiant as counsel for the

said Receivers, started in an investigation of the relation between the Denver and Rio Grande Railroad Company and the Western Pacific Railway Company, and also, an investigation of the law bearing thereon; that affiant became convinced from said investigation that the contract known as "Contract B" was a part of the mortgaged property and inasmuch as the same contained specific provisions, which provisions were repeated in the Deed of Trust, that the Western Pacific Railway Company should bring all necessary action at law and in equity for the enforcement of the same (although the same likewise provided that such action could be brought by the Trustee), affiant became convinced that there was at least legal reason for believing the same should be enforced by the Receivers;

That all of the actions of affiant in regard to said Contract "B" were based upon this belief and upon nothing else whatsoever; that all of the actions taken by affiant as counsel for such Receivers have been with the desire to have the said legal question determined in the due and regular process of law and no one of said actions has ever been actuated by any motive whatsoever in favor of or against any person or persons whatsoever; that as soon as the Honorable Circuit Court of Appeals had decided otherwise, this affiant immediately accepted the said opinion of said Court of Appeals as final and conclusive upon that question and so advised the said Receivers and that neither said Receivers nor affiant have intended since the opinion of said Court of

Appeals was rendered, to take any further steps whatsoever in regard thereto, nor do they now so intend;

That no act whatsoever of this affiant or of said Receivers in bringing before said Court and in urging the enforcement of said contract, or the bringing in of the Denver and Rio Grande Railroad as a party, has ever been actuated in any way, by any feeling of opposition whatever against the Reorganization Committee or the Trustee, or any other persons connected with, or intercepted in said suit, but solely by the legal belief that the same was their legal duty;

That when affiant was requested by the Judge of this court to act as counsel for said Receivers, said Judge stated to said affiant that he desired the affiant to prepare himself and present to the Court, all legal questions involved and those alone, and that affiant, to the best of his ability and belief, has done this and this alone;

That Alan C. Van Fleet is employed in the office of the law firm of which affiant is a member; that said law firm is a partnership consisting of George H. Mastick and the said affiant; that no other person is a member of said firm and that the said Alan C. Van Fleet is not and never has been a member of said firm and has no interest whatsoever in the earnings of said firm; that the said Alan C. Van Fleet was employed by said firm immediately upon his graduation from college and on account of his character and ability, and for no other reason, and ever since has been so employed;

That affiant believes as a matter of law, and has advised the Receivers herein, that said Receivers have no interest whatsoever in the question of the up-set price and that neither said Receivers nor said affiant intend to take any part whatsoever in any proceedings with regard to an up-set price unless they may be called upon as witnesses to supply any data in their possession;

That affiant believes as a matter of law, and has advised said Receivers that since the opinion of the Honorable Circuit Court of Appeals, there is no matter left to be controverted in which said Receivers are in any wise interested, excepting only the controversy with the Southern Pacific Company arising from their complaint in intervention with regard to their claims for switching charges;

That neither said Receivers nor affiant have in any way attempted, nor desire in any manner or form whatsoever, to delay the entry of a decree herein, unless their action in presenting to said Court, the question regarding the Denver and Rio Grande can be so construed; that since this said last matter has been disposed of by the said Honorable Circuit Court of Appeals, the said Receivers and their said counsel intend to and will facilitate by any means at their disposal, a speedy entry of a decree for sale of said property and termination of the said receivership.

Subscribed and sworn to before me this —— day of April, 1916.

_____.

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Marshal's Docket No. 7706. No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Mandamus,* etc. Order to Show Cause and Restraining Order, With U. S. Marshal's Return on Service of Writ. Filed Apr. 18, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

[Order to Show Cause and Restraining Order.]

In the United States Circuit Court of Appeals, for the Ninth Circuit.

In the Matter of the Petition of the EQUITABLE TRUST COMPANY OF NEW YORK, as Trustee, for a Writ of *Mandamus,* to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of The United States District Court, for the Northern District of California, Second Division.

The petition of the Equitable Trust Company of New York, as Trustee, praying for a Writ of *Mandamus* to be issued and directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of Califor-

nia, Second Division, having been presented to the senior Circuit Judge of the United States Circuit Court of Appeals, for the Ninth Circuit;

It is hereby ordered that the same may be filed, and that the said Honorable William C. Van Fleet be, and he is hereby directed to appear before the United States Circuit Court of Appeals, for the Ninth Circuit, at the courtroom of said court in San Francisco, California, on the sixth day of May, 1916, at the hour of 10:30 o'clock A. M. on said day, to show cause, if any, why said petition should not be granted, and why the writ as therein prayed should not be issued.

And it is further ordered that pending the hearing and disposition of this order to show cause, the said Honorable William C. Van Fleet be, and he is hereby restrained and enjoined from taking any steps or proceedings in that certain action pending in the United States District Court, for the Northern District of California, Second Division, and entitled "Equitable Trust Company of New York, Trustee, versus the Western Pacific Railway Company et al."

Dated April 17, 1916.

WM. B. GILBERT,
Circuit Judge.
ERSKINE M. ROSS,
Circuit Judge.
WM. H. HUNT,
Circuit Judge.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of the Equitable Trust Company of New York, as Trustee, for a Writ of *Mandamus*, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Petition for Writ of *Mandamus*.

Filed April 17, 1916.

F. D. MONCKTON,
Clerk.

[U. S. Marshal's Return on Service of Writ.]

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Order to Show Cause and Restraining Order on the therein named Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division, by handing to and leaving a certified copy thereof with said Honorable William C. Van Fleet, Judge of the United States District Court for the Northern Dist. of Cal., personally, at San Francisco, in said District, on the 18th day of April, A. D. 1916.

J. B. HOLOHAN,
U. S. Marshal.
By Geo. H. Burnham,
Chief Office Deputy.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the third day of May, in the year of our Lord one thousand, nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge, Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2781.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed by the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court for the Northern District of California, Second Division.

Order Granting Application to Amend Petition for Writ of Mandamus, etc.

Upon consideration of the Application to Amend Petition this day filed, for leave to amend the Petition for Writ of Mandamus filed in the above-entitled matter on the 17th day of April, A. D. 1916, and upon the oral motion of Mr. Jared How, counsel for the petitioner, and good cause therefor appearing, it is ORDERED that the said Petition for Writ of Mandamus be amended in accordance with said

Application for leave to amend, and that the said Application be printed and made a part of said Petition for Writ of Mandamus.

United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Petition of THE EQUITABLE TRUST COMPANY of New York, as Trustee, for Writ of Mandamus to be Issued and Directed to the Honorable WILLIAM C. VAN FLEET, Judge of the United States District Court, for the Northern District of California, Second Division.

Application to Amend Petition [for Writ of Mandamus].

The petitioner above named prays leave to amend the petition herein by inserting therein before the paragraph beginning with the third line from the bottom of page 15 thereof in the printed record, the following paragraph, that is to say:

"Upon the conclusion of such argument of Garrett McEnerney, hereinabove referred to, and upon the 8th day of April, 1916, to which day the hearing upon the matter of such affidavit and application had been adjourned and upon which day the arguments thereon had been continued, said judge Honorable William C. Van Fleet gave orally the following opinion and decision in the matter of such affidavit and application.

'The COURT.—I presume it is hardly necessary for me to suggest that the situation presented to the

Court is not a pleasant one; I do not suppose there is anybody within the sound of my voice who will not appreciate that that necessarily must be the fact. Resting under such a charge as has been made here places the Judge occupying the bench in a painful and embarrassing situation and makes his duty hard; but I trust that there is not lurking in the mind of anyone before the Court the idea that by reason of the unpleasant character of a duty coming before the Court it is disposed to shrink from the performance of that duty. It is not necessary to go into any recital of the facts which have been developed by the affidavits filed here on the one part and denied on the other. I thought and I now think that as to the facts set forth in this co-called disqualifying affidavit the Court was entitled to have the independent judgment of others in whom it had confidence to put an interpretation upon those facts for the purpose of laying before the Court their judgment as to whether or no they were of a character which in their nature tended to make such a case as the statute under which this affidavit was filed has in contemplation. I had my own ideas about it—I usually have; but, as I say, I wanted the aid of those whose minds were not affected by the circumscribing effect of the fact that I personally was the subject matter of those charges. We all appreciate, as I suggested the other day, that we are not the best judges in matters that pertain most strictly and vitally to ourselves. Men very frequently fail in reaching the best judgment where they attempt to decide matters of that kind for themselves. But

I was satisfied, and nothing that has been here suggested has to any extent shaken my conviction as to that, that the statute by its very terms contemplates and makes it the duty of the Court to pass not only upon the formal sufficiency of an affidavit of this kind, but the facts relied on as tending to disclose that state of mind which the law fixes as the disqualifying thing that shall require the abdication of jurisdiction otherwise vested in the Judge. That the Court is called upon to determine the sufficiency of those facts I would have been ready to hold, independently of any authorities that have been referred to here, because from the very language of the section, it seems to me that such is the necessary implication from its words. The Court must pass upon the legal sufficiency of this affidavit in order to determine the course it will pursue.

'What does the term "legal sufficiency" mean? It does not mean that because one may arrange a set of words to conform to the framework indicated in the statute the Court must stop and say that *ipso facto* upon the filing of such a paper it is ousted of its jurisdiction. The term "legal sufficiency" means that the affidavit shall in the substantive matter set forth as showing a case of personal bias or prejudice, be of a nature which the Court can say has that tendency; and it must also determine whether or not the statute has been complied with in its other essential feature, the filing of the affidavit within the time called for by the statute.

'I am perfectly satisfied that in every essential

aspect that has been discussed here by counsel this affidavit is not such as may be regarded under the statute as ousting this Court of jurisdiction in this case. First, that the essential facts set forth therein and relied upon as constituting the substance of the disqualifying situation do not in their legal effect tend to show any personal bias or prejudice on the part of the Court toward any party to this controversy. In the next place, I am entirely satisfied that in the attempt to show excusatory reasons for the failure to comply with the requirements of the statute to file this affidavit within the time fixed therein the facts are entirely insufficient not only to affirmatively show any excuse, but moreover the affidavit affirmatively shows that the essential facts relied upon here which would tend in any sense to create a personal bias or prejudice in the mind of this Court have been known to the parties and all of the parties to this controversy since very early in the year 1915 and soon after the action was filed in this court. Therefore when it is undertaken to allege in this affidavit reasons for not complying with the statute in filing it within time the party presenting this affidavit has been confronted with facts disclosed upon the record in this court and in the proceedings therefor had, which entirely refute those statements in the affidavit.

'Now, is the Court to be called upon to abdicate its jurisdiction because of the filing of a paper of that kind? It has been very aptly said here, and it has been repeatedly held, that it is as much the duty of a Judge to continue in the exercise of a jurisdic-

tion which is his, if he be not disqualified, as it is to surrender that jurisdiction if the facts are such as to bring about a disqualification.

'But I will go farther than that and say that if I felt the least sense of my inability to pass upon the rights of every party involved in this controversy and give them the due meed of justice to which they are entitled, I would ignore every consideration of technical sufficiency and would certify this affidavit to the Senior Circuit Judge with the request that someone else have the burden cast upon them of carrying out what is left before this Court of the controversy in question. But I cannot conscientiously say that I have the least question of my ability to do equal and fair and unbiased justice between those parties. Having that feeling, it is my duty to refuse to make such a certificate, and therefore I shall refuse it.

'I don't propose to enter upon questions that have been discussed here as to the good or bad faith of this thing. I want in that regard to say that I do not believe I am the only individual here who has had unpleasant duty to perform. I think I know the character of counsel for the plaintiff in this case sufficiently well—that is, that I have not so misjudged him as to be justified in thinking that this action, which has resulted in an attempt to disqualify the judge of this court, ever had its inception in his mind, or ever had his personal approval. And when I say that I have not been alone the one with unpleasant duties cast upon them I have reference to the fact that counsel found himself

placed in a position where, by reason of his relation to his clients and their determination that such a proceeding should be taken, it was necessary for him, in order to conform in that respect with the statute, that counsel should give his certificate that the affidavit was filed in good faith. I believe that if the real sentiments of counsel could be looked into, it would be found that that was an act very reluctantly performed on his part. So, as to that, I have no feeling of resentment in the matter whatever, nor do I resent in any judicial way the construction they have put upon the manner in which this Court has administered this trust that has been committed to it, and growing out of which they have seen fit to deduce prejudice. That is their privilege. The books are bristling with scores of cases where the same thing has been done. If they felt that they were justified in taking the course they have, then that is a matter which rests with them. It excites no resentment in my mind. Of course, I would be less than human were I to say that the character of the charges here made were such as are entirely agreeable to one's mind; I dislike it, however, more in behalf of the tribunal I represent than for my own personal feelings. If I felt that my character was such in this community that I could not safely leave it to the public to say whether the matters charged in this affidavit of a personal character would be calculated to affect my judgment, I would be very sorry to think that I have lived in this community for the length of time I have and administered justice from this bench and others

for the period that I have and yet have a feeling in the community that I would be subject to such influences as are intimated here—not charged.

'The affidavit does not say that I will be affected by the sordid motives which one might deduce from the matters charged in it, and I don't know exactly the purpose of putting such matters in the affidavit, unless it is to leave that sinister meaning to inference.

'But, summing up the whole affidavit in its entirety, I am quite satisfied, as I have said, that it wholly fails to make a case under the statute which would tend to show the existence in the mind of this Court of a state of personal bias or prejudice against any party connected with this case. I do not care whether technically the Equitable Trust Company is really a party to the controversy still remaining here, or not. It is argued that it is not; but it is a formal party, and I am not prepared to say that legally it did not have a right to interpose an affidavit of this kind. I care nothing about those things. I am looking only at the merits of the matter.

'I shall ask counsel to prepare an order in line with the suggestions that I have made, denying the application to certify this so-called disqualifying affidavit to the Senior Circuit Judge of this circuit.

'I want to say to counsel at this time that I am quite ready to proceed immediately and at as early a date as counsel may deem compatible with the situation to dispose of the matters remaining before this Court for disposition, to the end that this prop-

erty may be taken out of the hands of the receivers and turned over to those who may become the purchasers thereof. I shall not, however, set it down for a definite date unless counsel ask me, because it may well be that counsel for the complainant will feel that it is his duty to seek and to have determined the question of whether or not my action in refusing to certify this affidavit is correct. If they are so advised I will give them plenty of time to have it done. On the other hand, however, if it is the desire of counsel to have an early date set for the disposition of matters before this Court, I will listen to any such suggestion. And I may say to counsel that, if he desires to make any such suggestion, reserving his right to object hereafter to what is done by this Court, he may have that right reserved.' "

MURRAY, PRENTICE & HOWLAND,
JARED HOW,
Counsel for Petitioner.

State of California,
City and County of San Francisco,—ss.

I have read the amendment incorporated in the foregoing application for leave to include the same in the petition herein. The facts stated in such amendment are true.

JARED HOW.

Subscribed and sworn to before me this 3d day of May, A. D. 1916.

[Seal] FLORA HALL,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 2781. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Petition of The Equitable Trust Company of New York, as Trustee, for a Writ of Mandamus, to be Issued and Directed to the Honorable William C. Van Fleet, Judge of the United States District Court, for the Northern District of California, Second Division. Application to Amend Petition. Filed May 3, 1916. F. D. Monckton, Clerk.